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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 94.

INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED,
Petitioner,

v.

TERRITORY OF HAWAII, by Public Utilities Commission of the Territory of Hawaii, *Respondent.*

BRIEF FOR RESPONDENT.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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OPINIONS OF COURTS BELOW.

The opinion of the Supreme Court of Hawaii on questions of law reserved by the Trial Court was filed October 8, 1931 (R. 13), and is reported in 32 Haw. 127. The opinion of the Trial Court filed April 12, 1934, is not reported and appears at R. 45. The opinion of the Supreme Court of Hawaii on writ of error was filed July 25, 1936 (R. 259), and is reported in 33 Haw. 890. The opinion of the Circuit Court of Appeals filed April 16, 1938 (R. 318), is reported in 96 F. (2d) 412.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered April 16, 1938. The petition for a writ of certiorari was filed on June 6, 1938, and granted on October 10, 1938. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by Act of February 13, 1925 (28 U. S. C. Sec. 347).

STATEMENT.

The following additional statement will be of assistance in clarifying the issues on certiorari:

The Federal and Territorial Statutes Involved.

The Public Utilities Commission of the Territory of Hawaii (hereinafter sometimes called the "Commission") was created by and operates pursuant to the provisions of Act 89 S. L. Haw. 1913, which Act, as amended by Act 127, S. L. Haw. 1913, became effective on July 1, 1913, and is referred to herein as the "Utilities Act of 1913."[1]

The Commission is authorized by Sections 5, 6, 7 and 13 (Sections 2193, 2194, 2195 and 2201, R. L. Haw. 1925; see *infra* Appendix) to investigate all public utilities doing business in the Territory of Hawaii in the following matters:

(a) The manner in which it is operating with reference to safety and accommodation of the public.

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[1] This Act became Chapter 132 of the Revised Laws Hawaii, 1925, referred to herein as "R.L.Haw. 1925." The Chapter is summarized in petitioner's brief, Appendix 41 to 46. A table showing the original sections of the Act and the corresponding sections of R.L.Haw. 1925 is contained herein in Appendix 47.

All of the pertinent sections relating to the Commission's power of investigation and its duty to collect statutory fees are reproduced herein in Appendix pp. 48 to 55.

(b) The safety, working hours and wages of its employes.

(c) The reasonableness of the rates and fares charged by it.

(d) The value of its physical property.

(e) The issuance of its stocks and bonds and the disposition of the proceeds thereof.

(f) The amount and disposition of its income and all of its financial transactions.

(g) Its business relations with other persons, companies or corporations.

(h) Its compliance with all applicable territorial and federal laws.

(i) Its compliance with the provisions of its franchise, charter and articles of association.

(j) Its classifications, rules, regulations, practices and service.

(k) "All matters of every nature affecting the relations and transactions between it and the public, or persons, or corporations."

(l) The causes of any accident resulting in loss of life and any other accidents which, in the opinion of the Commission, require investigation.

Section 13 of the Act (Section 2201 R. L. Haw. 1925; see *infra* Appendix) provides that the Commission shall examine all of the matters mentioned hereinabove in paragraphs (a) to (k) inclusive "*notwithstanding that the same may be within the jurisdiction of the interstate commerce commission, or within the jurisdiction of any court or other body,* and when after such examination the commission shall be of the opinion that the circumstances warrant, it shall be its duty to effect the necessary relief or remedy by the institution and prosecution of appropriate proceedings or otherwise *before the interstate commerce commission, or such*

court or other body, in its own name or in the name of the Territory, . . .'"[1]

Section 14 of the Act (Section 2202 R. L. Haw. 1925; see *infra* Appendix) provides that all rates and fares observed by any public utility must be "just and reasonable" and the Commission shall have power "insofar as it is not prevented by the Constitution or laws of the United States" to regulate, fix and change all rates, fares and charges by order.[2]

Section 20 of the Act (Sec. 2210 R. L. Haw. 1925; see *infra* Appendix) provides that the Act "shall not apply to commerce with foreign nations, or commerce with the several states of the United States, *except insofar as the same may be permitted under the Constitution and laws of the United States* . . ."

The duty is given the Commission by Section 17 of the Utilities Act of 1913, as amended by the provisions of Act 127 S. L. Haw. 1913 (Sec. 2207 R. L. Haw. 1925, see *infra* Appendix) to collect from each utility *which is subject to investigation by the Commission* semi-annually, fees equal to one-twentieth of one per cent of the gross receipts from its public utility business and also a fee of one-fiftieth of one per cent of the par value

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[1] Unless otherwise noted, throughout this brief, the emphasis has been supplied.

[2] The Supreme Court of Hawaii has ruled that where the rates, fares and charges of a local utility are regulated by the Interstate Commerce Commission, the Shipping Board or other Federal agency, this divests the Commission of its power *to issue regulatory orders covering the same matters,* and the Commission is limited in its duty to investigating and supervising the federally regulated utility, and bringing appropriate action where necessary before the Federal agency. *In re Inter-Island S. N. Co.,* 24 Haw. 136; *In re Hawaiian Telephone Co.,* 26 Haw. 508; *Territory* v. *Inter-Island S. N. Co.,* 32 Haw. 127; *Territory* v. *Inter-Island S. N. Co.,* 33 Haw. 890.

The respondent does not challenge the validity of this ruling in these proceedings.

of its capital stock outstanding. The fees are to be paid into the Public Utilities Commission fund which fund is appropriated for the payment of all salaries, wages and expenses authorized or prescribed by the Utilities Act of 1913.

Legislative power of the Territory of Hawaii is granted to the Territorial legislature by Act of Congress of April 30, 1900 c. 339 s. 55 (31 Stat. 150) (U. S. C. Tit. 48, Sec. 562) known as the Hawaiian Organic Act; and all Territorial laws under Section 6 of the Hawaiian Organic Act are subject to repeal or amendment by the Congress of the United States. All public utility franchises granted by the territorial legislature require the approval of Congress to be effective under the provisions of Section 55 of the Hawaiian Organic Act, which section reads in part as follows:

> "The legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States locally applicable . . . but the legislature shall not grant to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise without the approval of Congress; . . ." (Sec. 55, Hawaiian Organic Act)

Prior to the effective date of the Utilities Act of 1913, the Territorial Legislature adopted Act 135, S. L. Haw. 1913 (reprinted *infra* Appendix p. 56), to become effective upon its approval by the Congress of the United States, for the express purpose of making the Utilities Act of 1913 applicable to public utilities operating in the Territory under congressionally approved franchises, and (as will be shown hereafter) for the express purpose of having the approval of territorial investigation of federally regulated utilities.

By Act of March 28, 1916, c. 53, 39 Stat. 38 (reprinted *infra* Appendix p. 58), Congress amended and ratified Act 135, S. L. Haw. 1913, and confirmed and approved the Utilities Act of 1913 by making the same applicable in all respects to "all public utilities and public utilities companies organized or operating within the Territory of Hawaii." The Act of Congress amending and ratifying Act 135, S. L. Haw. 1913, reads in part as follows:

> "The franchises granted by [various territorial acts approved by Congress] *and all franchises heretofore granted to any other public utility or public-utility company, and all public utilities and public-utilities companies organized or operating within the Territory of Hawaii,* and the persons and corporations holding said franchises shall be subject as to reasonableness of rates, prices, and charges and in all other respects to the provisions of act eighty-nine of the laws of nineteen hundred and thirteen of said Territory creating a public-utilities commission and all amendments thereof for the regulation of public utilities in said Territory * * * *Provided, however, that nothing herein contained shall in any wise limit the jurisdiction or powers of the Interstate Commerce Commission under the Acts of Congress to regulate commerce* * * *" (Italics indicate additions to Act 135, S. L. Haw. 1913, made by Congress).

By the Act of September 7, 1916, c. 451, 39 Stat. 728 (U. S. C. Tit. 46, s. 801, *et seq.* summarized in Petitioner's brief, Appendix pp. 51-56) (hereinafter referred to as the "Shipping Act, 1916") there was created the United States Shipping Board with certain regulatory powers over carriers engaged in transportation by water of passengers or property between places in the same territory. Petitioner relies on the Shipping Act, 1916,

for its position that as a matter of statutory construction the Territory has been divested entirely of its power to investigate the Petitioner and collect the statutory fees.

The Facts.

Beginning in 1913 all public utilities operating in the Territory of Hawaii, whether or not holding congressionally approved franchises, and whether or not regulated by a federal agency, paid to the Commission all of the fees prescribed by the Utilities Act of 1913 (R. 69, 88); and all such public utilities except the Petitioner have at all times since then continued to pay statutory fees (R. 69). Beginning August 7, 1923 (R. 43)[1] the petitioner refused to make reports to the Commission and contended that the Utilities Act of 1913 had no application whatever to it, and that the Commission was without jurisdiction to make the investigations authorized under said Act. (Stip. of Counsel R. 44.)

This action was brought to compel the Petitioner to pay the statutory fees in order to provide the necessary funds to enable the Commission to carry out its powers and duties with respect to the petitioner under the Utilities Act of 1913.

The Supreme Court of the Territory of Hawaii in a decision rendered in 1931 on reserved questions raised by demurrer (*Territory* v. *Inter-Island S. N. Co.*, 32 Haw. 127, R. 12) held that the Shipping Act of 1916 did not divest the Commission of its power or duty to examine into and investigate the business of the Petitioner and that since the utility was subject to investigation by the Commission, it was obligated to pay the statutory fees.

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[1] Petitioner stopped paying fees in March, 1923, that being the due date for semi-annual fees. (R. 3)

On the trial of the case the Commission introduced evidence showing that the total fees paid to the Commission have been insufficient to pay the expenses for carrying on the work of the Commission (R. 70), and that at any one time the Commission had on hand only the most insignificant balances; that from time to time between 1913 and 1929 the legislature of the Territory of Hawaii appropriated sums of money, amounting in all to $38,182.61, in order to carry on the work of the Commission (R. 70, 107); that in 1929 a specific appropriation of $5,000.00 was made for the Commission which was set apart for the purpose of paying the expenses of the Commission in connection with the litigation of the position taken by the Petitioner (R. 70, 108-109); that no portion of the fees paid by utilities has ever gone into the general revenues of the Territory (R. 70). There was evidence that during 1916 and 1917 the Commission expended on account of an investigation of the petitioner, an amount greatly in excess of the fees paid by the petitioner during those years (R. 71, 124-125).[1] It was stipulated (R. 43-44) that the

[1] The Petitioner advances the contention in this Court (Pet. Br. 24) that because the order of the Commission dated September 28, 1917 (entered as a result of a general investigation of the Petitioner in 1916 and 1917), purporting to reduce the rates and charges of the Petitioner, was declared by the Supreme Court of the Territory of Hawaii to be beyond the jurisdiction of the Commission (*Re Inter-Island S. N. Co.*, 24 Haw. 136), evidence as to cost of making such investigation has no relevancy in determining the reasonableness of fees. It is clear, however, that the investigation made was fully within the jurisdiction of the Commission and that the relief which the investigation disclosed was required should, according to the ruling of the Supreme Court (*Territory* v. *Inter-Island S. N. Co.*, 32 Haw. 137; 33 Haw. 890), have been obtained by appropriate proceedings before the Shipping Board. The cost of such investigation was very material evidence if this Court should hold that the Petitioner is in any position in these proceedings to raise the issue as to the reasonableness of the fees. (R. 125, Analysis of Disbursements, Ex. C., R. 71, 69.)

Commission did not investigate the petitioner during the period in question (during which the Petitioner insisted the Commission lacked power to investigate) and that the Petitioner made no reports to the Commission except that the auditor examined the Petitioner's books to ascertain the statutory fees payable by the Petitioner (R. 43). The Petitioner rested on evidence that the reasonable value of the auditor's services for time spent in ascertaining the statutory fees did not exceed $30 (R. 103). The Petitioner objected to any testimony as to what the expenditures of the Commission had been prior to 1922 (R. 89). The trial court, upon the objection of the Petitioner, refused to admit evidence as to what an investigation of the business of Petitioner would cost, because, on the theory of the Petitioner, such evidence was not material (R. 126, 128).

It appears from the statutes as well as the record (R. 130-133) that the work required by the Commission in investigating federally regulated utilities is practically identical with that required for utilities locally regulated, the only difference being that with regard to the former utilities [identified as Group "A" utilities (R. 88)] the regulatory orders are required to be entered by the Federal agency; while in the latter utilities [identified as Group "B" utilities] the Commission may enter its own orders. The petitioner attempts in its brief (pp. 8, 22) to show that the majority of expenditures of the Commission were for Group "B" utilities. While it is true that for the period from 1922 to 1930 the auditor testified the majority of expenditures were for Group "B" utilities (R. 121) it was shown on redirect examination that this was a mere matter of accident during the years in which the petitioner (one of the three largest utilities in the Territory) (R. 69) was paying no fees. The auditor testi-

fied that for the period 1917 to 1922 inclusive, if expenses were allocated on the basis of hearings held, it would be found sixty per cent of such hearings involved Group "A" utilities; and forty per cent Group "B" utilities (R. 136). It is fair to say that it appears from the record that if the Petitioner had paid its fees and the Commission had had funds with which to discharge its duties with regard to Petitioner, the proportion of expenditures attributable to the two classes of utilities (if this is a material fact) would have been greatly altered.

The hearing on the trial closed on March 5, 1933 (R. 156). Six months later the Petitioner filed an amended answer (R. 29) contending that in addition to all other defenses theretofore interposed, it was engaged in interstate and foreign commerce (R. 156). Over objection of the respondent, evidence was then introduced tending to show that although the Petitioner is a domestic corporation whose business is entirely conducted between points within the territorial limits (R. 196-197), and although Petitioner has no through rates, issues no through bills of lading, and does entirely a local business (R. 197), a portion of its freight, after delivery by Petitioner, is transported to the mainland of the United States or to foreign countries in a continuous journey, and likewise a portion of the freight that it receives for transportation is received in the Territory from foreign countries or the mainland of the United States (R. 183-198).

The trial court ruled that Congress, by the enactment of the Act of March 28, 1916, expressly ratified and approved the Utilities Act of 1913, and adopted the Commission as its agency to have the investigatory powers with regard to federally regulated utilities provided by the Act, and approved the measure of the fees as set

forth in the Act (R. 57-62); that it was not necessary to consider the incidental effect, if any, of the exaction of the fees upon interstate and foreign commerce (R. 58); that there was no showing that the fees were disproportionate to the services required of the Commission (R. 61-62).

The Supreme Court of Hawaii found that there had been no showing that the fees prescribed to enable the Commission to perform its duties under the Act were disproportionate to the services required to be performed, and that the making of an investigation was not a condition precedent to the collection of the fees, and that if they were not unreasonable, they did not burden interstate or foreign commerce (R. 261-267).

The opinion of the Circuit Court of Appeals is not clear,[1] but counsel understands from it that the court found that Congress had expressly ratified the Act creating the Commission (R. 330); and the court further held that if it be assumed that the Commission had no power to investigate the Petitioner in the conduct of interstate commerce (which matter the Court stated it did *not* decide) (R. 333) still the Petitioner conducted a large purely intra-territorial business which had no relationship to interstate commerce, and that even assuming that the investigation powers of the Commission were limited to this field, the Petitioner could be required to pay the statutory fees (R. 334). The Circuit Court of Appeals further held, after giving consideration to the recently decided cases of *Great Northern*

[1] The Circuit Court of Appeals apparently failed throughout its opinion to distinguish between "interstate commerce" in the constitutional sense, and intra-territorial commerce, treated by definition for purposes of the Shipping Act, 1916, like interstate commerce. (See R. 330-336.)

Railway Co. v. *State of Washington*, 300 U. S. 154, 160, and *Bourjois, Inc.*, v. *Chapman*, 301 U. S. 183, 197, that upon the record of past income and expenses[1] there was a clear showing that the fees prescribed by the statute were not unreasonable or disproportionate (R. 336).

QUESTIONS PRESENTED.

1. Is the Utilities Act of 1913 inapplicable by its own terms to the Petitioner by reason of the kind of freight Petitioner carries?

2. Has the Utilities Act of 1913 and the collection of the fees prescribed therein had the ratification and approval of Congress by the enactment of the Act of March 28, 1916?

3. If congressional approval is shown to the exaction of non-discriminatory utility fees from all local utilities, to be used to pay the expense of regulation of local utilities not federally regulated and the expense of investigation of local utilities which are federally regulated, is it any defense to an action for the collection of such fees that the fees are measured in part by gross receipts from freight alleged to be carried in interstate or foreign commerce?

4. Did Congress by the passage of the Shipping Act, 1916, divest the local Commission of its power of investigation and of its right to collect the fees to permit such investigation expressly provided for by the Utilities Act of 1913?

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[1]Although the respondent submits that the Petitioner is estopped in these proceedings to claim that the fees are excessive where it has failed to pay the fees to permit investigation, a review of the record bearing on the reasonableness of the fees is set out *infra* p. 34, *et seq.*

5. Are the fees prescribed shown to be so excessive as to impugn the good faith of the law and to show that the law is in fact a revenue raising measure?

SUMMARY OF ARGUMENT.

Where a public utility operating within the Territory of Hawaii is subject to rate regulation by a Federal agency, it is made the duty of the local Commission after investigation to institute proceedings before the Interstate Commerce Commission or other Federal body or court to correct the matters coming within the jurisdiction of such Federal agency. There is imposed upon all public utilities operating in the Territory and subject to investigation statutory fees measured by gross income and by outstanding capital stock of each utility. Under the Utilities Act of 1913 these fees must be used to defray the expenses of the Commission.

Congress, with plenary power over the affairs of the Territory, has ratified and approved the territorial legislation and by its own amendment confirmed its application to all public utilities organized or operating within the Territory of Hawaii. The ratification by Congress of the Utilities Act of 1913 disposes of every contention that the territorial law is invalid because it constitutes a burden on interstate or foreign commerce.

The Respondent contends that there is no inconsistency between the Utilities Act of 1913 as approved by Congress and the Shipping Act of 1916; that it affirmatively appears from the record that the exactions imposed by the statute are not more than sufficient and are probably insufficient in amount to enable the Commission to perform its duties with regard to the Petitioner; that the Utilities Act of 1913 is not a revenue

raising measure and legislative appropriations have been necessary from time to time to enable the Commission to perform its duties; that the Petitioner has completely failed in any respect to show that the fees are known to be unreasonable or have proven to be in excess of the amount needed to pay for the inspection services required to be rendered; that the Petitioner has failed to show discrimination or arbitrary administration, and in fact seeks in this case to gain an advantage over the other utilities by illegally refusing to pay the fees necessary to enable the Commission to investigate and by refusing to comply with the Act under the claim that it is not applicable to its business; that the case is controlled by the principles announced in *U. S. Nav. Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, 481, which would have to be overruled to sustain Petitioner's position; that no conflict has been shown with the principles announced in *Great Northern Railway Co.* v. *State of Washington*, 300 U. S. 154.

ARGUMENT.

I—The Utilities Act of 1913 Providing for the Investigation of Federally Regulated Utilities is Clearly Applicable to the Petitioner.

The Petitioner contends that it is engaged in interstate and foreign commerce because it carries freight which is moving in interstate and foreign commerce, and that as a matter of statutory construction the Utilities Act of 1913 is inapplicable in any respect to it. (Pet. Br. 14, 38)

The respondent contends that the clear meaning of the statute is that the same shall be applicable to all public utilities doing business in the Territory of

Hawaii,[1] except where, and to the extent that, such application is prohibited by the Constitution or laws of the United States; and that the Congress of the United States has ratified and approved the applicability of the statute to all public utilities, including Petitioner, operating in the Territory of Hawaii. Respondent will show later in this brief that even without ratification by the Congress of the local statutes, the judgment in favor of the Commission must be sustained because the exaction of the fees does not conflict with either the Constitution or the laws of the United States.

The facts are not disputed that Petitioner is a Hawaiian corporation doing business only between points in the Territory of Hawaii, with no through rates, through contracts or transshipment contracts (Stip. of Counsel, R. 42; R. 198); that its business "since it began doing business under the Kingdom of Hawaii up to the present time has been the transportation of freight and passengers solely between the islands and ports of the Territory. There is no contention that the defendant itself operates or performs any service between ports within the Territory and ports on the mainland of the United States or foreign countries, except in so far as goods picked up at way ports may themselves be starting on a journey to ports outside of the Territory requiring trans-shipment at Honolulu to other vessels of other companies and bound for destinations beyond territorial waters; or except as other goods brought from distant ports to Honolulu are picked up by defendant's boats for distribution to points of consignment or ultimate destination on other islands of the Territory . . . The actual service rendered

[1] The Petitioner has conceded that it is a public utility within the definition contained in Sec. 18 of the Utilities Act of 1913 (Sec. 2208 R.L. Haw. 1925, *infra* Appendix p. 54) (R. 42).

by the defendant is a service of transportation wholly within territorial waters and between territorial ports regardless of destination or origin of goods." (Decision of Trial Court, R. 51-52; Stip. of Counsel, R. 42.)

Section 2210, Chapter 132, R. L. H. 1925 (Sec. 20, Utilities Act of 1913) provides as follows:

> "Sec. 2210. *Application of this chapter.* This chapter shall not apply to commerce with foreign nations, or commerce with the several states of the United States, *except in so far as the same may be permitted under the Constitution and laws of the United States;* nor shall it apply to public utilities owned or operated by the Territory, or any county or city and county, or other political division thereof."

This section proclaims in statutory form the intention of the Legislature to go as far in the investigation or regulation of utilities as the Constitution and laws of the United States permit, and shows the legislative intention not to regulate or investigate in any manner unless the Constitution and the laws of the United States permit it. Petitioner has expressly conceded in this cause (R. 17) that "such authority as the Territory has over public utilities has in fact been granted to the public utilities commission." In other words, the Act purports to provide for the exercise by the Commission of every supervisory power permitted under the Constitution and the laws of the United States. Appellant urges in effect that the language of the statute *proprio vigore* renders the Utilities Act of 1913 inapplicable to it because it carried freight, which, within decisions of the United States Supreme Court, has been held (for purposes of showing that congressional power thereover is paramount) to be freight carried in interstate or foreign commerce.

An examination of the language of the statute will show that there would be no ground which would justify any construction other than that arrived at by the Supreme Court of the Territory of Hawaii (R. pp. 264-265) that the chapter is clearly applicable to the Petitioner. The language used throughout the Utilities Act of 1913 indicates that the legislature recognized the power in Congress to place regulatory authority over any local utility at any time and in any respect in some commission, body or board other than the local commission.[1]

It is also clear under the provisions of Section 2201 R. L. Haw. 1925 that the legislature contemplated in the event Congress exercised its power, the benefit of local supervision and investigation would still continue unless the same were contrary to an act of Congress.

Petitioner is attempting to have Section 2210, R. L. Haw. 1925 negative the definition of public utility contained in Section 2208 R. L. Haw. 1925 as though the former read

> "This chapter shall not apply to public utilities operating within the Territory of Hawaii where any portion of the gross receipts of such utilities is derived from the carriage of goods intended to be carried or trans-shipped in interstate or foreign commerce or from goods brought to the Territory from the mainland or foreign countries."

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[1] This matter was stated by the Supreme Court of the Territory of Hawaii as follows:

> "The Legislature of Hawaii, in Section 13 of the Public Utilities Act [later Sec. 2201 R.L.Haw. 1925]; heretofore quoted virtually recognizes the power of Congress to place the regulation of the business of a public utility in some commission, board or court, other than the Public Utilities Commission, thereby taking such regulation out of the control of the Commission. *Re Inter-Island S. N. Co.*, 24 Haw. 136, 147."

It is apparent, however, that it was the legislative intention to have the Utilities Act of 1913 applicable to all utilities including the Petitioner unless prevented by the Constitution or laws of the United States. The claims of the Commission are based on specific language of the statute. *The conflict with the Constitution or laws of the United States must, therefore, be affirmatively and clearly shown* if the Petitioner is to be relieved under the terms of the statute of the duties imposed thereby; and the Petitioner's assertion (Pet. Br. 14, 38) that as a matter of statutory construction the Utilities Act of 1913 is inapplicable to it, is wholly without foundation.

II—Congress Has Ratified and Approved the Investigation of Federally Regulated Local Utilities and the Collection of the Statutory Fees to Permit Such Investigations.

The trial court ruled that Congress, which has final and sole authority in the matter of legislation for the Territory of Hawaii as well as in the field of interstate and foreign commerce, by the enactment of its Act of March 28, 1916 (39 Stat. 38, c. 53) (*infra* Appendix p. 58) expressly adopted the machinery provided by the territorial statutes as the supervising machinery for all public utilities operating in the Territory "whether wholly local in these operations or incidentally affecting matters which could be denominated interstate and foreign commerce." (R. 57-60)

The following rather lengthy quotations are inserted herein because they state clearly the basis of the trial court's decision:

> "But the complete answer to defendant's position is that the Congress which has this final and

sole authority, acted in 1916 under 39 Stat. 38, c. 53, (if not before under Organic Act, s. 55) *and expressly adopted the commission in Hawaii as its agency to have such powers over any public utilities operating within the Territory, so long as the commission did not interfere with the interstate commerce commission; and, under subsequent legislation, as it should not interfere with the jurisdiction of the shipping board.* These two federal bodies have by acts of Congress certain exclusive plenary powers but Congress had before it in 1916 the fact that the legislature of the Territory had created a public body to act as a watcher over public interests affected by the activities of public utility companies operating in the Territory. (For cases on construction in light of surrounding circumstances see N. Y. etc. Ry. v. I. C. C., 200 U. S. 361; Komada & Co. v. U. S., 215 U. S. 392; St. Paul etc. Co. v. Phelps, 137 U. S. 528; Danciger v. Cooley, 248 U. S. 319, 326; N. Y. v. Knight, 192 U. S. 21; Alward v. Johnson, 282 U. S. 509.) With that knowledge Congress expressly adopted this same body as its agency, simply modifying the plenary powers that might result from the existence of such a watchful, supervisorial commission." (Decision, Trial Ct. R. 57.)

* * *

". . . It [Congress] has by the act of March 28th, 1916, expressly adopted the machinery provided by the Territory as the Congressional machinery affecting all utility companies whether wholly local in these operations or incidentally affecting matters which could be denominated interstate and foreign commerce. In view of this approval and adoption by Congress and in view of the fact that Congress has wider powers within and under the Territory than it has in connection with states of the Union, this court cannot see that any useful purpose would be furthered by enter-

ing into a refinement of discussion of the cases involving the validity of state legislation. It may be safely assumed that Congress was aware of the location of Hawaii, distant from the mainland and acted or refrained from further modification of local action with such obvious facts in view. As to the Territory, Congress was a fully informed 'superior'." (Decision Trial Ct. R. 58-59.)

* * *

". . . Congress adopted this enactment by express reference and with no exceptions. By its adoption this court construed the fact to be that Congress has acted in regard to all public utilities knowing that the exactions of section 2207 R. L. 1925 were to be segregated exclusively into a fund to pay for the existence of this agency which was to watch over companies performing public utilities service for the people of the Territory." (Decision, Trial Ct. R. 60.)

The respondent contends that Congress has clearly indicated its approval of the machinery prescribed by the local statutes for the local supervision of utilities and the exaction of the fees to maintain such machinery; that the Commission is charged with the duty of making investigations of utilities federally regulated and of prosecuting actions before appropriate federal bodies when necessary; that Congress has plenary legislative power within the Territory as well as over the field of interstate and foreign commerce; that the approval of Congress disposes of any defense based on an asserted unconstitutional burden on interstate or foreign commerce.

The Legislative Background Resulting in Congressional Amendment and Ratification Makes the Matter Clear.

Although the statute seems clear on its face, Petitioner takes sharp issue (Pet. Br. 34-38) with the holding of the Trial Court and the Circuit Court of Appeals that the congressional approval contained in the Act of March 28, 1916, 39 Stat. 38, c. 53 (Appendix 58) had application to the Petitioner.

The circumstances under which the Act of Congress was adopted make it quite clear that Petitioner's contentions in this behalf present no substantial question for consideration by the Court.

In 1913 when the Utilities Commission was created, railroads operating wholly within the Territory of Hawaii were subject in all respects to the regulatory jurisdiction of the Interstate Commerce Commission under the provisions of the Act of June 29, 1906, 34 Stat. 584, c. 3591 (U. S. C. Tit. 49, s. 1) amending the Interstate Commerce Act; and such railroads have since annexation of Hawaii been subject to the detailed regulatory provisions governing almost every field of railroad operation contained in the Federal Safety Appliance Acts, (Act of March 2, 1893, c. 196, 27 Stat. 531 as amended by Act of March 2, 1903, c. 976, 32 Stat. 943, U. S. C. Tit. 45, s. 8 *et seq.*) The regulation of telephone companies operating in the Territory of Hawaii was placed under the jurisdiction of the Interstate Commerce Commission by the Act of February 28, 1920, 41 Stat. 456, and remained under such jurisdiction until the enactment by Congress of the Act of June 19, 1934, c. 652, s. 602 (b), 48 Stat. 1102, when regulatory jurisdiction was revested in the local Commission. Many other detailed regulatory Federal statutes have from time to time been made expressly applicable to

the utilities operated wholly within the Territory of Hawaii.[1]

The close relationship between the territorial and Federal governments was given recognition in the Utilities Act of 1913 and the Commission was expressly authorized and directed to investigate among other things *the compliance of the local utilities with all applicable Federal laws* with the duty of protecting the public by either making its own orders if the matter were in its regulatory power or by bringing proper proceedings before the Interstate Commerce Commission or such court or other body as might be appropriate. The distance of Hawaii and the difficulty of individual complaint furnishes ample legislative motive for the passage of the Utilities Act of 1913 in the form in which it was enacted.

To accomplish congressional ratification of the application of the Utilities Act of 1913 to utilities operating under franchises approved by Congress and utilities federally regulated, the 1913 Territorial Legislature enacted Act 135, S. L. Haw. 1913 (reprinted Appendix 56) to become effective upon its approval by the Congress of the United States. It should be noted, as was pointed out by the Trial Court, that in Act 135, S. L. Haw. 1913, all franchises which had theretofore been approved by Congress are specifically mentioned and referred to by Act number and approval date (R. 64). In 1916, when Congress had before it for consideration the ratification and approval of Act 135, S. L.

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[1]As examples: Bills of Lading Act, Act of August 29, 1916, 39 Stat. 538, U.S.C. Tit. 49, Sec. 81 et seq.; Employees Compensation Act, Act of April 22, 1908, 35 Stat. 65, U.S.C. Tit. 45, Sec. 52 et seq.; Hours of Service of Employees, Act of March 4, 1907, 34 Stat. 1415, U.S.C. Tit. 45, Sec. 61 et seq.; Air Commerce Act of 1926, Act of May 20, 1926, 44 Stat. 568, U.S.C. Tit. 49, Sec. 171 et seq.

Haw. 1913, Congress amended the Act by inserting additional provisions in Act 135, S. L. Haw. 1913, and extending the scope thereof to include and cover all public utilities organized or operating within the Territory of Hawaii. By the Act of March 28, 1916; 39 Stat. 38, c. 53, (Appendix 58) Congress amended Act 135 by adding the language which is italicised hereunder, so that said Act of Congress reads in part as follows:

> ". . . *and all franchises heretofore granted to any other public utility or public-utility company, and all public utilities and public-utilities companies organized or operating within the Territory of Hawaii,* and the persons and corporations holding said franchises shall be subject as to reasonableness of rates, prices, and charges and in all other respects to the provisions of act eighty-nine of the laws of nineteen hundred and thirteen of said Territory creating a public-utilities commission and all amendments thereof for the regulation of public utilities in said Territory; . . . ."

Included among the utilities specifically referred to by name in Act 135, S. L. Haw. 1913, were railroads subject to the complete regulatory jurisdiction of the Interstate Commerce Commission. Congress, therefore, to prevent confusion, added the following proviso to Act 135 S. L. Haw. 1913:

> *"Provided, however,* That nothing herein contained shall in any wise limit the jurisdiction or powers of the Interstate Commerce Commission under the Acts of Congress to regulate commerce."

The power of Congress under the Constitution to amend and extend the provisions of Act 135, S. L. Haw. 1913, and to ratify and confirm the applicability of the

Public Utility Act of 1913, has never been denied or doubted.[1]

Petitioner urges that under "the fundamental rule of *noscitur a sociis,*" the Act of Congress has application only to franchised corporations (Pet. Br. 34). The mere reading of the statute would demonstrate that the decision of the Trial Court on this matter (R. 64), quoted hereunder is unassailable:

> "Where language in an act is plain and unambiguous it needs no construction: In re the suggested application of the doctrine '*noscitur a sociis*' argued by counsel, the court calls attention to the following cases raising other principles of construction. The act of Congress under construction as well as the original act of the legislature of Hawaii (135, L. 1913) recited all the territorial legislature franchise acts then in existence, see R. L. 1925 Vol. II, p. 1980 *et seq.* The general language then following in the act of Congress which was added by Congress, would have no meaning if confined to term 'franchise'. The obvious, express class is, 'all public utilities operating in the Territory.' This is plain and all conclusive. It needs no 'construction'; nor can the title restrict the plain language thereof.
>
> See *U. S.* v. *Fisher*, 2 Cranch. 358, 385-397 (Marshall, Ch. J.), 2 L. ed. 304, 313-317. *Pennock* v. *Dialogue*, 2 Peters 1, 7 L. ed. 327. *Yerke* v. *U. S.*, 173 U. S. 439, 43 L. ed. 760. *Texas* v. *Chiles*, 21 Wall. 488, 22 L. ed. 650. *Boudinot* v. *U. S.*, 11 Wall. 616, 20 L. ed. 227. *Lewis* v. *U. S.*, 92 U. S. 618, 23 L. ed. 513. *U. S.* v. *Ewing*, 184 U. S. 140, 46 L. ed. 471. *American Express Co.* v. *U. S.*, 212 U. S. 522, 53 L. ed. 635. *Caminetti* v. *U. S.*, 242 U. S. 470, 61 L. ed. 442. *Commissioner* v. *Gott-*

[1] *France* v. *Connor*, 161 U.S. 65, at 72; *Mormon Church* v. *U.S.*, 136 U.S. 1; *National Bank* v. *Yankton County*, 101 U.S. 129. Such power is specifically reserved in Section 6 of the Hawaiian Organic Act, Act of April 30, 1900, c. 339 s. 6 (31 Stat. 38).

lieb, 265 U. S. 310, 68 L. ed. 1031. (*Decision, Trial Ct., R.* 64)"

While recourse to the congressional debates is wholly unnecessary because the statute is unambiguous, the statements made in Congress at the time of the amendment and ratification of the Territorial Statute, which are referred to in the margin[1] show beyond any dis-

[1] H. R. 65, 64th Cong. 1st Sess. as originally introduced provided merely for the ratification of Act 135, S.L.Haw. 1913. The amendments made to Act 135, S.L.Haw. 1913, referred to above, were substantially as recommended by the Committee on Territories. See H. Rept. 43, 64th Cong., 1st Sess., p. 2, which report reads in part as follows:

> "The second amendment, in line 2, page 3, to wit, 'and all franchises heretofore granted to any other public utility or public utility company, and all public utilities and public utilities companies organized or operating within the Territory of Hawaii,' is recommended, in order that *all of the public service companies and corporations may be embraced in the provision of this act.*"

On reporting the amendments on the floor of the House of Representatives, the following statement of the purpose of the amendments was made:

> Mr. Dowell. " . . . . Now, on the question of the amendments of the committee, the first amendment is found on page 3 and *covers any other public utilities not specified in the original act which may be doing business in the Territory.* That your committee believed to be necessary in order that some utility company doing business in the Territory, *though not having been granted a charter by Congress,* should be placed under this commission.
>
> The second amendment, or the last amendment, provides 'That nothing herein contained shall in any wise limit the jurisdiction or powers of the Interstate Commerce Commission under the acts of Congress to regulate commerce within the States and the Territories of the United States.' That amendment was offered by your committee because there is a railroad in this Territory which rightly comes under the jurisdiction of the Interstate Commerce Commission, and *it is not the purpose to in any manner interfere with the power of the Interstate Commerce Commission.* . . . . "

pute that Congress intended the Utilities Act of 1913 to apply to all utilities operating within the Territory.

III—The Exaction of Territorial Utility Fees Approved by Congress Cannot Impose a Burden on Interstate and Foreign Commerce.

When Congress approves the exaction of fees by confirming the applicability of the Utilities Act of 1913 in all respects to all utilities operating in the Territory, all discussions of "burdens upon interstate or foreign commerce" are made superfluous. The Court may take judicial notice of the fact that virtually all carriers for hire in the Territory of Hawaii carry materials which are either received after transshipment or are to be trans-shipped into interstate or foreign commerce. The investigation fees are based in part on gross receipts from the utility business conducted entirely within the Territory of Hawaii. There can be no question but that Congress is acting constitutionally when it directs the exaction of fees measured by gross utility income earned by transportation between places within the Territory because Congress has plenary power over interstate and foreign commerce (U. S. Constitution,

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Statement of Rep. Dowell in the House of Representatives, January 19, 1916, Cong. Rec. 64th Cong., 1st Sess., Vol. 53, Part 2, p. 1264.

It also appears Cong. Rec. *loc. cit. supra*, that the word "amended" inserted in the clause "is hereby amended, ratified, approved and confirmed, as follows:" was added from the floor (Rep. Mann) but the word "amended" was not carried into the title of H. R. 65, *supra*, but this cannot restrict the plain meaning of the statute. The title of the original Congressional bill is broad enough in any event to include the amendment.

[1] This was recognized in the Insular Territory of Porto Rico, *People* v. *Central Fortuna*, 22 Porto Rico Rep. 100 where a local utilities tax was sustained.

Art. 1, sec. 8, cl. 3) and also has plenary power over the Territory (U. S. Constitution, Art. 4, sec. 3, cl. 2).

The constitutionality of the congressional assent to *state* regulation of interstate and foreign commerce and the validity of such regulation after congressional assent has been firmly established.

In re Rahrer, 140 U. S. 545;
Pabst Brewing Co. v. *Crenshaw,* 198 U. S. 17;
Phillips v. *Mobile,* 208 U. S. 472;
De Bary & Co. v. *La.,* 227 U. S. 108 (foreign commerce);
Foppiano v. *Speed,* 199 U. S. 501.

If a *state* may with congressional assent tax or regulate interstate commerce, a territory clearly may with such assent exact non-discriminatory public utilities fees for support and maintenance of a local supervisory service.

At the time of the adoption of the Act of March 28, 1916, there was already a settled administrative construction by the Commission of the provisions of the Utilities Act of 1913. The Commission had collected from, and all utilities operating within the Territory (including Petitioner) had paid and continued to pay all of the fees prescribed by the Utilities Act of 1913 regardless of the nature of the freights carried, and regardless of the fact that the regulatory power over some utilities had been vested in a Federal agency. (R. 69, Ex. A; R. 88, 92)

If there were any questions as to the congressional intention, the settled prior administrative construction of the Utilities Act would be determinative of the proper construction to be put on the Act as it was approved by Congress.

New York etc., R. Co. v. *Interstate Commerce Commission*, 200 U. S. 361;
Komada & Co. v. *U. S.*, 215 U. S. 392;
St. Paul, etc., Ry Co. v. *Phelps*, 137 U. S. 528;
Heiner v. *Colonial Trust Co.*, 275 U. S. 232.

IV—The Enactment by Congress of the Shipping Act of 1916, Did Not Divest the Local Commission of Its Powers of Investigation or Its Duty to Collect the Fees Provided to Permit Such Investigation.

The Petitioner contends (Pet. Br. 32-34) and at all times since 1923 (when it stopped paying fees to the Commission) has contended (Stip. of Counsel R. 44) that the Commission is without jurisdiction to investigate the condition of the Petitioner or the manner in which it operates its business; that the enactment by Congress of the Shipping Act of 1916[1] creating the United States Shipping Board divested the Commission of its right, power and duty to make the investigations in express terms required or permitted to be made under the provisions of Section 2193, R. L. Haw. 1925; relieved the Commission of its statutory duty to make recommendations and institute and prosecute proper proceedings required by Section 2201, R. L. Haw. 1925; and consequently relieved the petitioner of its obligation to pay the statutory fees required by Section 2207, R. L. Haw. 1925.

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[1] Petitioner can not seriously urge that because Petitioner operates vessels which are subject to Federal inspection for safety of facilities (Pet. Br. 6 and footnote) this precludes the investigations by the Commission of Petitioner's business and its relations to the public. See *Clyde Mallory Lines* v. *Alabama*, 296 U. S. 261. Intraterritorial railroads whose facilities are subject to the detailed provisions of the Federal Safety Appliance Acts and whose operations are subject to the regulatory jurisdiction of the Interstate Commerce Commission are nevertheless subject to investigation by the Commission. See also *Kelly* v. *Washington*, 302 U. S. 1.

The Territorial Supreme Court in 1917 had held that the Commission was without power after the enactment of the Shipping Act of 1916 to issue its own order reducing the rates of this Petitioner *Re Inter-Island S.N. Co.*, 24 Haw. 136. The Territorial Supreme Court likewise held in 1922, *In Re Haw. Tel. Co.*, 26 Haw. 508, that the Commission was without power to regulate by its own order the rates or charges of telephone companies operating wholly within the territory during the time that regulatory power over such companies was vested in the Interstate Commerce Commission. As heretofore indicated the respondent has not challenged the validity of these holdings in these proceedings.

It was on the basis of these decisions that Petitioner resisted the payment of all fees beginning with the year 1923 and contended that all powers of the Commission with regard to the business of Petitioner "in any respect or for any purpose" had been taken away from the Commission. (R. 8) Petitioner's contentions in this regard were the subject of the reserved questions of law certified to the Supreme Court in the present proceedings in 1930. (R. 9) The Supreme Court in a clear and unassailable opinion (R. 13) held that the Shipping Act did not repeal by implication or otherwise the provisions of the Utilities Act of 1913 authorizing the Commission to investigate federally regulated utilities doing business in the Territory of Hawaii. The Court states in this regard:

> "And if it is authorized, as it is by Act 89, to make an investigation which is complete and effective,—solely for the purpose of placing the facts before the body authorized to regulate—can this power or its exercise be held to be in conflict with the power of the shipping board to regulate or with the intent of Congress that the shipping board

> alone should regulate? We think not. In our opinion the power to investigate, to make complaint and to institute and to maintain proceedings before the shipping board is not inconsistent with the power of the shipping board to decide upon the merits of the complaint and to regulate as in its wisdom it may see fit to regulate. Under these circumstances, there can be no repeal by implication." (Op. of Sup. Ct., R. 24-25.)

Respondent has already shown that the machinery for supervision of utilities regulated by federal agencies had been expressly approved by Congress. If there were any doubt as to the propriety of the Territory investigating federally regulated utilities (such as railroads, which were specifically mentioned in the Act of Congress) such doubt had been completely resolved by the enactment of Congress earlier in the year of its Act of March 28, 1916.

The issue raised by Petitioner does not concern possible encroachment by the Territory upon a field exclusively within the power of Congress. The case involves two acts of Congress, which it is submitted are perfectly harmonious. When Congress approved the Utilities Act of 1913 by its Act of March 28, 1916, it was contemplated, as shown in language of the Utilities Act, that Federal statutes might from time to time extend federal control to other local utilities in the Territory. The enactment of the Shipping Act on September 7, 1916, is entirely consistent with the general plan for territorial supervision approved by Congress earlier in the year and does not repeal or withdraw that approval. *Panama R. R. Co.* v. *Johnson,* 264 U. S. 375.

Petitioner contends that even in the absence of congressional approval of the Utilities Act of 1913 there is no inconsistency or conflict between the federal and

territorial statutes, and that a territorial law enacted under the police power which supplements and makes the federal law more effective in attempting to enforce a compliance therewith is valid in the absence of such conflict or inconsistency.[1]

Petitioner attempts to show that because the Shipping Act includes intra-territorial commerce on the high seas within its definition of "interstate commerce" placed under the jurisdiction of the Shipping Board, the effect is to oust the local commission *of all jurisdiction for every purpose.* (Pet. Br. 32-34) In other words, Petitioner does not rely on any express statutory conflict, but relies on the general proposition that because Congress has declared Petitioner's business to be "interstate commerce" and has now occupied the field, territorial action is precluded. Petitioner's contention in this regard we shall demonstrate is squarely contrary to the principles which have been announced in the decisions of this Court.

(a) The Shipping Act should be given like interpretation, application and effect as the Interstate Commerce Act.

Petitioner concedes (Pet. Br. 32) and it is well settled that under the principles announced in *U. S. Nav. Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, 481, the Shipping Act and the Interstate Commerce Act should be given a like

[1] *Chicago & N. W. R. R.* v. *Fuller*, 17 Wall. 560 (State law requiring the posting of interstate rates); *Railroad Commission Cases*, 116 U. S. 307; *Adams Express Co.* v. *Charlottesville Woolen Mills*, 109 Va. 1; *Oregon R. & Nav. Co.* v. *Campbell*, 173 Fed. 957, 980. The visitorial power of the Territory over corporations created by and existing under its laws is sufficient to establish Respondent's case (*Hale* v. *Henkel*, 201 U. S. 43). Counsel has been unable to find any authority and Petitioner refers to none, which denies to a sovereign power the right under its police powers to examine and investigate into the affairs of its own public service corporations.

interpretation, application and effect. The Court in that case said:

> "In its general scope and purpose, as well as in its terms, that act [Shipping Act] parallels the Interstate Commerce Act; and we cannot escape the conclusion that Congress intended that the two acts, each in its own field, should have a like interpretation, application and effect. It follows that the settled construction in respect of the earlier act must be applied to the later one, unless, in particular instances, there be something peculiar in the question under consideration, or dissimilarity in the terms of the act relating thereto, requiring a different conclusion." *U. S. Nav. Co.* v. *Cunard S. S. Co.* (*supra* at p. 481).

The application and effect of the Interstate Commerce Act in connection with the territorial powers of investigation have already had the attention of Congress and we have demonstrated that it was the definite congressional intention *not to preclude territorial investigations* in the field covered by the Interstate Commerce Act.

When the Act of March 28, 1916, which in its title and text refers to local railroads specifically, came before Congress for approval, Congress added the *proviso* as follows:

> "Provided, however, that nothing herein contained shall in any wise limit the jurisdiction or powers of the Interstate Commerce Commission under the Acts of Congress to regulate commerce."

If the provisions of the Utilities Act of 1913 giving the Commission power to examine railroads and collect fees were rendered ineffective by the Interstate Commerce Commission's occupancy of the field, the

ratification by Congress and the proviso added would be wholly meaningless.[1]

If Congress did not intend to preclude territorial investigation of local railways or local telephone companies because they were federally regulated by the Interstate Commerce Commission, it is clear that Congress by enacting the much less comprehensive Shipping Act of 1916 did not intend to preclude investigation of the carriers by water subject to that act. (*U. S. Nav. Co.* v. *Cunard S. S. Co.* (*supra*).

Therefore Petitioner is seeking to obtain an interpretation of and effect from the Shipping Act of 1916 different from that given by Congress itself to the Interstate Commerce Act. For Petitioner to succeed in this contention would necessarily involve the overruling by this Court of the principles announced in the *U. S. Nav. Co.* v. *Cunard S. S. Co.* (*supra*) decision.

(b) Analogous statutes have been enacted in other jurisdictions.

Because of the relationship of the local government to the Federal Government and because of the distance from the mainland of the United States, there are particular reasons for public authorities in this Insular Territory attempting through a central local agency to assure compliance by utilities with all Federal and Territorial laws. However, even without express Congressional sanction, in a number of states legislation has been enacted requiring local commissions to investigate

[1] The inclusion of the amendment was for the purpose of making certain that the Interstate Commerce Commission was not ousted from its jurisdiction, and not for the purpose of excluding local railways from the Utilities Act of 1913, as shown by the legislative history of the Act of March 28, 1916. (See *supra* p. 25 and footnote.)

interstate carriers' compliance with orders, decrees, rules and regulations of the Interstate Commerce Commission and the reasonableness of their rates, charges and practices, and authorizing local commissions to bring proper complaints where they are justified. (Supreme Court Op., R. 25.) For the convenience of the Court, there has been reprinted in the Appendix (pp. 61-71) copies of the investigation statutes of the several states referred to by the Supreme Court of Hawaii in its opinion. (R. 25)

The validity of these statutes appears never to have been judicially questioned,[1] and it is apparent that, where Congress approves of the supervisory arrangement, such approval is controlling.

V—The Fees Are Not Excessive or Unreasonable and Their Collection Does Not Violate Any of Petitioner's Constitutional Rights.

Petitioner contends that even if it be held that the Commission has authority to investigate Petitioner's business, nevertheless Petitioner cannot be compelled to pay the statutory fees because the imposition of such fees imposes a direct burden on interstate and foreign commerce (Pet. Br. 16 to 30); that the fees are so ex-

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[1] The validity of a typical provision is declared in *Oregon R. & Nav. Co.* v. *Campbell*, 173 Fed. 957, 980, as follows:

> "From this one provision of the act, if from none other, the deduction is absolute that there was no intention on the part of the Legislature of the state to enter the domain of interstate regulation of railroad traffic. The commission is a state commission, designed to render state service, and no intendment should be deduced that it is empowered to execute a broader or an unlawful service, unless the language is explicit, unmistakably leading to such conclusion. No such language is found in the act, and upon its face it is not inimical to the commerce clause of the national Constitution."

cessive and unreasonable in relation to work performed during the period by the Commission as to amount to a taking of Petitioner's property without due process of law. (Pet. Br. 30-31).

Upon the latter contention Petitioner states that its argument is the same as that relating to interstate and foreign commerce (Pet. Br. 31), hence we shall consider the matter of the claim of excessiveness under one heading.

(a) Petitioner is estopped to claim that the fees are excessive in this proceeding.

Before considering the record, which we contend affirmatively shows that the fees are in all respects reasonable and proper, we urge upon the Court that Petitioner is estopped in these proceedings from contesting the reasonableness of the fees prescribed by the statute. It appears from the record (R. 70, 130) that the ability of the Commission to carry out its duties, and the extent to which its investigations may be made to extend is largely determined by the amount of money which is available for the Commission.[1]

When Petitioner refused to pay fees, it did so, as is shown by the record, not because past history had demonstrated that the fees were known to be excessive (R. 44, 89, 126-127, 131) but because Petitioner contended that the Utilities Act of 1913 no longer had application in any respect to Petitioner's business. (R. 44)

[1] The Court may take judicial notice that lack of finances has been one of the chief factors hampering public utility commissions generally in carrying out their functions. *Mosher & Crawford, Public Utility Regulation* (1933) 67-81. See *Douglass* v. *Arizona Edison Company*, 1 P. U. R. (N. S.) 493, 498 (Ariz. Corp. Comm., 1933); *re Alabama Power Co.*, P. U. R. 1932, E. 323, 328-330; (*Ala. Pub. Serv. Comm.*, 1932); 46 *Yale L. Journal* 1251.

Bearing on the reasonableness of the fees, the only evidence offered by Petitioner in defense was proof of the fact that had been stipulated to prior to trial (R. 44), viz: that during the period of the refusal to pay fees (1922-1930) no investigation of Petitioner had been made by the Commission. This theory of the defense was consistently maintained by Petitioner throughout the trial (R. 89, 100, 102, 116, 126-128, 131) and throughout the appeal to the Supreme Court. (R. 278). As we understand Petitioner's position, it is still their contention in this Court that the reasonableness of the fee must be tested by the value of services *actually performed for the utility*, and that based upon such "services rendered" (Pet. Br. 19) the greatest fee that can constitutionally be collected from Petitioner for the years 1922 to 1929 inclusive is $30. (Pet. Br. 16, 19, 21, 27, 28, 29.)

No attempt was made by Petitioner to show that the fees sought to be collected were known to be in an unnecessarily large amount. (R. 131) In fact Petitioner disavowed any intention of showing (R. 89, 94) that the fees would be in excess of what would actually be required to make the investigations contemplated by the statute. (R. 128, 131). The only evidence introduced by Petitioner on this behalf was evidence as to the reasonable value of the services performed by the Commission's auditor in ascertaining for purposes of preparing this litigation the amount of the fees that were required to be paid by Petitioner (R. 100-103), upon which showing Petitioner rested. (R. 103) In other words, Petitioner's theory was that the recovery of fees could only be maintained upon the same theory as the recovery for services rendered at the request of Petitioner under a *quantum meruit* count. (R. 89, 126-127,

131) It is only by reason of a legislative appropriation obtained in 1929 that the Commission was able to bring into litigation the contention of Petitioner. (R. 108) We submit that in fairness to the Commission and to the other utilities, who consistently complied with the statute, Petitioner should not be permitted to claim after refusing to pay the fees and effectively preventing the Commission from carrying out its powers and duties, that it is not obligated to pay the fees because the Commission has not done what Petitioner said it could not lawfully do. In one breath Petitioner says the Commission is without power to investigate and hence to collect fees; and in the next breath Petitioner says the Commission cannot constitutionally collect the fees without first performing the services required by making an investigation of its business. If this position were sound, all that any large utility or group of utilities in the Territory of Hawaii would have to do is to refuse to pay fees under an assertion of invalidity, the Commission could make no investigation because it is dependent on such fees, and hence the Commission could not constitutionally collect fees. Due process of law does not require or permit any such absurdity.

(b) The judgment entered herein is consistent with the principles announced in Great Northern Railway Co. v. Washington.

If it be assumed that Petitioner is in a position to urge the excessiveness of the fees in these proceedings it is submitted that the record affirmatively shows that the fees are not excessive nor their collection unconstitutional under the principles announced in *Great Northern Ry Co.* v. *State of Washington,* 300 U. S. 154.

With regard to burdening interstate commerce, the trial court held that the statute provided a reasonable

method of meeting the expenses of public utility supervision provided by the statute; that the expense was in fact distributed equally and without discrimination (R. 62); that Congress adopted and approved the method of division of expense without exceptions and that this disposed of any question as to whether the fees burden interstate or foreign commerce. (R. 62-53)[1]

It is apparent that in Congress and the Territory together there resides legislative power to constitutionally impose nondiscriminatory public utility taxes on utilities operating in the Territory. It follows that even if in fact there should be brought into the Commission's fund a substantial surplus (which is unlikely and which thus far has not happened, R. 70) such surplus would have been validly collected under the taxing power of the Territory and Congress.[2]

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[1] Wholly apart from congressional approval, we submit that there is a sufficient separation in fact between transportation carried wholly between points in the Territory by Petitioner, and interstate and foreign commerce in the constitutional sense so that a nondiscriminatory public utilities tax measured by the gross income received from the intra-territorial commerce of the Petitioner could be sustained. The fact that the islands are not contiguous to any other portion of the United States furnished a factual difference which distinguishes this case from cases like *Galveston Ry. Co.* v. *Texas*, 210 U. S. 217 (Pet. Br. 15). See *Pennsylvania R. Co.* v. *Knight*, 192 U. S. 21; *Cornell Steamboat Co.* v. *Sohmer*, 235 U. S. 549; *People* v. *Central Fortuna*, 22 Porto Rico Rep. 100 (Writ of error dismissed, 243 U. S. 659); *Ponce Lighter Co.* v. *Mun. of Ponce*, 19 Porto Rico Rep. 725.

[2] See *Texas Co.* v. *Brown*, 258 U. S. 466 where this Court held that the State could not without the consent of Congress impose a tax directly on interstate commerce, but that where investigation fees were well within the field of permitted state action, the imposition could be for revenue as well as inspection purposes, and that the excess collected over cost of inspection represented a state tax validly imposed. See also: *Noble State Bank* v. *Haskell*, 219 U. S. 104, 110; *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, 245; *Charlotte C. & A. R. Co.* v. *Gibbes*, 142 U. S. 386; *People ex rel. N. Y. Electric Lines Co.* v. *Squire*, 145 U. S. 175.

So long as the tax is within the field of general legislative power of the Territory it would seem that the classification of taxpayers was a matter for legislative determination:

N. Y. Rapid Transit Corp. v. *N. Y. C.*, 304 U. S. 573, (A special tax for relief imposed on utilities subject to supervision of department of Public Service was held valid);
Cincinnati Soap Co. v. *U. S.*, 301 U. S. 308, 323;
Talbott v. *Silver Bow County Commissioners*, 139 U. S. 438, 446;
Great Northern Ry. v. *Washington*, 300 U. S. 154, 168. (Dissenting opinion of Cardozo, J.)

The Great Northern case purported to approve the principles established in *Foote & Co., Inc.* v. *Stanley*, 232 U. S. 494. In this case the Court held invalid an inspection charge of one cent per bushel on oysters coming into Maryland in interstate commerce from other states because it was shown that the charge regularly yielded a revenue greatly in excess of the amount required to make the inspection, which excess was expended in discharging general state policing functions. The Court states as its reasons:

"Inspection necessarily involves expense, and the power to fix the fee, to cover that expense, is left primarily to the legislature, which must exercise discretion in determining the amount to be charged, since it is impossible to tell exactly how much will be realized under the future operations of any law. Beside, receipts and disbursements may so vary from time to time that the surplus of one year may be needed to supply the deficiency of another. *If, therefore, the fees exceed cost by a sum not unreasonable, no question can arise as to the validity of the tax so far as the amount of the charge is concerned. And even if it appears that*

> *the sum collected is beyond what is needed for inspection expenses, the courts do not interfere, immediately on application, because of the presumption that the legislature will reduce the fees to a proper sum. Red "C" Oil Mfg. Co.* v. *Board of Agriculture,* 222 U. S. 393, 56 L. Ed. 244, 32 Sup. Ct. Rep. 152. *But when the facts show that what was known to be an unnecessary amount has been levied, or that what has proved to be an unreasonable charge is continued, then they are obliged to act in the light of those facts,* and to give effect to the provision of the Constitution prohibiting the collection by a state of more than is necessary for executing its inspection laws. In such inquiry they treat the fees fixed by the legislature for inspection proper as *prima facie* reasonable, and do not enter into any nice calculation as to the difference between cost and collection; nor will they declare the fees to be excessive unless it is made clearly to appear that they are obviously and largely beyond what is needed to pay for the inspection services rendered." (pp. 503-504)

Regardless of the burden of proof, it is clear that the unconstitutionality of the statute on the ground of excessiveness can be established in any event only if it is shown that "what was known to be an unnecessary amount has been levied, or that what has proved to be an unreasonable charge is continued." *Foote & Co.* v. *Stanley, supra, Great Northern Ry.* v. *State of Washington, supra.*[1] Not only is this proof lacking but all elements are lacking which could in any way result in the burden of proving the reasonableness of the fees being shifted to the Territory. In the *Great Northern Ry.*

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[1] This principle was established by a line of cases: *New Mexico ex rel. McLean* v. *Denver etc. R. Co.,* 203 U. S. 38; *Red "C" Oil Mfg. Co.* v. *Board of Agriculture,* 222 U. S. 380; *Patapsco Guano Co.* v. *Board of Agriculture,* 171 U. S. 345.

Co., case it appeared from the majority opinion that the burden of proof was shifted to the state because either rightfully or wrongfully large sums of money paid to the commission by railroads doing interestate as well as intra-state business had been spent in connection with the appearance of the Department before the Interstate Commerce Commission and in connection with reparation suits. It also appears that no legislative appropriation had been made and that during the period from 1923 to 1929 there had been an accumulation in the surplus of the Department of some $225,000.

In the case at bar Petitioner, after paying the fees for the years 1913 to 1922 inclusive (R. 69), paid no fees for the years in dispute claiming that the statute was inapplicable. From the year 1913 to and including the year 1929 the Territorial Legislature from time to time made appropriations to permit the Commission to carry out its functions (R. 70, 107, 108, 109) and in fact it was necessary for the Legislature to appropriate $5,000.00 in 1929 for the very purpose of paying for legal services in connection with the bringing of the suit which is now before this Court. (R. 108) The record further shows that at the time Petitioner refused to pay the fees the Commission did not have and in fact never has had on hand more than a very insignificant balance (R. 70), and there is no evidence that could possibly support a finding that the statute was in truth a revenue raising measure. The record further shows that in the years during which the Petitioner was paying its required fees, the Commission had undertaken a comprehensive investigation of Petitioner's rates and charges and that during the years 1916-1917 the Commission incurred direct expenses in the amount of $7,-

239.58 (R. 125) and indirect expenses attributable to Petitioner in the amount of $5,385.20 (R. 125) or a total of $12,624.78 during a period in which Petitioner in fact paid the Commission total fees of less than $5.000.00 (R. 69)[1]

It further appeared that up to the time of these proceedings no rate base had been established for Petitioner (R. 133) and upon objection of Petitioner the trial court refused to admit evidence as to what an investigation of the business of Petitioner would cost because, on the *theory of Petitioner,* such evidence was not material. (R. 126, 130) In this Court, for the first time, Petitioner is urging the contention that the statute is invalid *on its face* because it exacts the same fees from utilities locally regulated as from utilities federally regulated but locally supervised. (Pet. Br. 8, 21-23, 39)

Petitioner by this latest contention is attempting to raise a new factual issue; that is, whether the expense in

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[1] Petitioner strenuously objects to a consideration of the cost of this investigation because the order entered reducing rates was held to be beyond the jurisdiction of the Commission. But that the investigation was within the admitted jurisdiction of the Commission cannot be denied and was expressly admitted by the utility in that proceeding and in the printed argument filed November 17, 1917 by the utility, in *In re Inter-Island S. N. Co.,* 24 Haw. 136 (No. 1984 Supreme Court of Hawaii) appears the following (p. 45):

> "(i) After September 7, [1916] the Commission knew that they had no power to fix rates; their *power was to investigate,* and, under Section 2233, [later Section 2201 R. L. Haw. 1925] begin a proceeding before the Shipping Board to have their recommendations carried out. *The whole record shows that this is what they were doing, and, in case their investigation showed the rates were too high, they could have applied to the Shipping Board under Section 2233.*". (Explanatory matter in brackets inserted.)

connection with the investigation of federally regulated utilities must not in fact be substantially less than the expense of investigating local utilities and entering regulatory orders. This is the very matter that on the trial Petitioner contended was immaterial. (R. 89) We fail to see why it must not in the absence of evidence be assumed that it costs more to investigate and bring proceedings before federal agencies than it does to investigate and enter regulatory orders. The legislative determination of reasonableness and Congressional consent to the exaction of similar fees from all utilities would seem to be a complete answer to any claim of inequality between the classes of utilities.

The recent case of *Bourjois, Inc.* v. *Chapman,* 301 U. S. 183, 187, completely disposes of Petitioner's present contention. The Court said, in passing on the validity of an inspection fee sought to be collected in advance of inspection:

> "It was obviously impossible then to determine whether the fees would prove to be in excess of the administrative requirements, and in this situation it is sufficient if it is shown that the charges are not unreasonable on their face. . . . The mere fact that fees imposed might exceed the cost of inspection is immaterial."

The legal position of Petitioner is in no way analagous to the position of the railroads in the *Great Northern Railway Co. case,* and if the language in the majority opinion can be construed as requiring the Territory to adduce proof of the reasonableness of fees prior to the time that such fees are paid and prior to the time that it can be ascertained what the cost of investigation and

supervision will be, then such a requirement should be re-examined by this Court.[1]

In summary, on this phase of the case we have shown that the Great Northern Railway Co., case, *supra,* makes it clear that the fees are not invalid for any unreasonableness appearing on the face of the statute. The later case of *Bourjois, Inc.* v. *Chapman* and all the authorities clearly establish that once it is shown that an inspection fee statute is not invalid on its face, then the Court will not indulge in conjecture as to whether the fees when paid will or will not exceed the amount reasonably needed to carry on a proper governmental function in a field well within the Territory's power and in a manner sanctioned by the Federal Government.

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[1] In *Great Northern Railway Co.* v. *State of Washington* (*supra*) because of the expenditures incurred by the department in reparation cases before the Interstate Commerce Commission (p. 168) there may have been some question, as stated in the dissenting opinion of Cardozo, J., as to whether the case was not one involving the exercise of "a power [which] has been granted to be used in exceptional circumstances"—in which event the rule is that the "State must bring itself within the exception if it seeks to act within the grant." (p. 169) Here it can be shown without question: "A different situation confronts us in the case at hand. Here a statute of the state [or territory] does not trespass upon a field of legislation where entry is forbidden without the license of the nation. What has been done is well within the field of general legislative power, with every presumption of validity back of it. *In such circumstances the burden of making good a claim of invalidity and thus establishing an exception is on the assailants of the rule, and not on its proponents.*" (p. 170)

It also appears that the question suggested by Cardozo, J., (p. 168) as to "whether anything in the Fourteenth Amendment forbids the recognition of a single and all inclusive class of public service corporations without further subdivision," has since been clearly answered in the negative by this Court in *N. Y. Rapid Transit Corp.* v. *N. Y. C.*, 304 U. S. 573.

See also: 46 Yale L. Journal, 1251 [note]; 85 U. of Pa. L. Rev. 639; 4 U. of Chicago L. Rev. 505; 36 Mich. L. Rev. 163.

CONCLUSION.

It is respectfully submitted that the case involves no conflict between the exercise of territorial and federal powers and that the various defenses of unconstitutionality and illegality sought to be made out by Petitioner are wholly invalid in their application to a congressionally approved territorial law; that the Utilities Act of 1913 is in all respects applicable to Petitioner and its applicability to all utilities operating in the Territory of Hawaii has had the express approval of Congress by the enactment of the Act of March 28, 1916, that so long as the rates, charges and practices of Petitioner are federally regulated, Petitioner is included under the Utilities Act of 1913, in the class of utilities expressly made subject to investigation by the Commission; that the approval by Congress of the applicability of the Utilities Act of 1913 to all utilities dispenses with all questions of burdens on interstate or foreign commerce; that there is no showing of any kind that the fees were known to be unreasonable or excessive in amount or that the fees are exacted for revenue raising purposes rather than for the *bona fide* purpose of permitting the Commission to discharge its duties with respect to Petitioner; that the judgment of the Circuit Court of Appeals must therefore be affirmed.

Respectfully submitted,

JULIUS RUSSELL CADES,
Attorney for Respondent.

URBAN EARL WILD,
Of Counsel.

Dated at
Washington, D. C.,
November 7, 1938.

APPENDIX

APPENDIX

APPENDIX A.

Utilities Act of 1913

This statute was originally Act 89 of the Session Laws of Hawaii 1913, as amended by Act 127 of the Session Laws of Hawaii 1913, and took effect on July 1, 1913. This Act together with certain amendments which are not material to the case at bar became Chapter 132 of the Revised Laws of Hawaii 1925 said Chapter controlling these proceedings. The chapter is summarized in Petitioner's Brief, Appendix pages 41-46.

For the convenience of the Court there is shown in the table hereunder the original sections of said Act 89, Sessions Laws of Hawaii 1913, and the corresponding sections in which they subsequently appear in the Revised Laws of Hawaii 1925. All pertinent provisions of the Chapter are quoted herein, following the table.

Act 89, S. L. Haw. 1913	*Revised Laws of Hawaii 1925*
Section 1	Section 2189
2	2190
3	2191
4	2192
5	2193
6	2194
7	2195
8	2196
9	2197
10	2198
11	2199
12	2200
13	2201
14	2202
15	2205
16	2206
17	2207
18	2208
19	2209
20	2210

Section 4, Act 89, S. L. Haw. 1913; Section 2192, R. L. Haw. 1925, provides:

"Sec. 2192. *General powers and duties* The commission shall have the general supervision hereinafter set forth over all public utilities doing business in the Territory, and shall perform the duties and exercise the powers imposed or conferred upon it by this chapter."

Section 5, Act 89, S. L. Haw. 1913; Section 2193, R. L. Haw. 1925, provides:

"Sec. 2193. *May investigate what.* The commission and each commissioner shall have power *to examine into the condition of each public utility doing business in the Territory,* the manner in which it is operated with reference to the safety or accommodation of the public, the safety, working hours and wages of its employees, the fares and rates charged by it, the value of its physical property, the issuance by it of stocks and bonds, and the disposition of the proceeds thereof, the amount and disposition of its income, and all its financial transactions, its business relations with other persons, companies or corporations, its compliance with all applicable territorial and Federal laws and with the provisions of its franchise, charter and articles of association, if any, its classifications, rules, regulations, practices and service, and all matters of every nature affecting the relations and transactions between it and the public or persons or corporations. *Any such investigation may be made by the commission on its own motion,* and shall be made when requested by the public utility to be investigated, or upon a sworn written complaint to the commission, setting forth any prima facie cause of complaint. All hearings conducted by the commission shall be open to the public. A majority of the commission shall constitute a quorum."

Section 6, Act 89, S. L. Haw. 1913; Section 2194, R. L. Haw. 1925, provides:

"Sec. 2194. *Public utilities to furnish information.* Every public utility shall at all times, upon request, furnish to the commission all information that it may require, *respecting any of the matters concerning which it is given power to investigate;* and shall permit the examination of its books, records, contracts, maps, and other documents by the commission, or any of its members, or any person authorized by it in writing to make such examination, and shall furnish the commission with a complete inventory of its property in such form as the commission may direct."

Section 7, Act 89, S. L. Haw. 1913; Section 2195, R. L. Haw. 1925, provides:

"Sec. 2195. *Report accidents.* Every public utility shall report to the commission all accidents caused by or occurring in connection with its operations and service, *and the commission shall investigate the causes of any accident which results in loss of life, and may investigate* any other accidents which in its opinion require investigation.

Section 8, Act 89, S. L. Haw. 1913; Section 2196, R. L. Haw. 1925, provides:

"Sec. 2196. *Commission may compel attendance of witnesses, etc. In all investigations made by the commission,* and in all proceedings before it, the commission and each commissioner shall have the same powers respecting administering oaths, compelling the attendance of witnesses and the production of documentary evidence, examining witnesses, and punishing for contempt, as are possessed by circuit judges at chambers. In case of disobedience by any person or persons to any order of the commission or of any commissioner,

or any subpoena issued by it or him, or of the refusal of any witness to testify to any matter regarding which he may be questioned lawfully, it shall be the duty of the any circuit judge, on application by the commission or a commissioner, to compel obedience as in case of disobedience of the requirements of a subpoena issued from a circuit court, or a refusal to testify therein. No person shall be excused from testifying or from producing any book, waybill, document, paper or account *in any investigation or inquiry by or hearing before the commission* or any commissioner, when ordered to do so, upon the ground that the testimony or evidence, book, waybill, document, paper or account required of him may tend to incriminate him or subject him to penalty or forfeiture; but no person shall be prosecuted, punished or subjected to any penalty or forfeiture for or on account of any act, transaction, matter or thing concerning which he shall under oath have testified or produced documentary evidence. Nothing herein contained shall be construed as in any manner giving to any public utility immunity of any kind. The fee and traveling expenses of witnesses shall be the same as allowed witnesses in the circuit courts, and shall be paid by the Territory out of any appropriations available for the expenses of the commission.

Section 9, Act 89, S. L. Haw. 1913; Section 2197; R. L. Haw. 1925, requires each utility to publish its rates, charges and rules in the manner required by the Commission.

Section 10, Act 89, S. L. Haw. 1913; Section 2198, R. L. Haw. 1925, provides:

"Sec. 2198. *Notice of hearings.* Whenever *an investigation is undertaken* by the commission, reasonable notice in writing of such fact and of the subject or subjects to be investigated shall be

given to the public utility concerned, and when based upon complaints made to it as prescribed in section 2193, a copy of such complaint, *and a notice in writing of the date and place fixed by the commission for beginning such investigation,* shall be served upon the public utility and the complainant not less than two weeks prior to the date designated for such hearing."

Section 11, Act 89, S. L. Haw. 1913; Section 2199, R. L. Haw. 1925, provides:

"Sec. 2199. *Right to be represented by counsel. At any investigation* by or proceeding before the commission, the public utility concerned and any complainant shall have the right to be present and represented by counsel, to present any evidence desired and to cross-examine any witnesses who may be called."

Section 12, Act 89, S. L. Haw. 1913; Section 2200; R. L. Haw. 1925, provides:

"Sec. 2200. *Commission may make rules.* The commission may make and amend rules not inconsistent with law respecting the procedure before it, and shall not be bound by the strict rules of the common law relating to the admission or rejection of evidence, but may exercise its own discretion in such matters with a view to doing substantial justice."

Section 13, Act 89, S. L. Haw. 1913; Section 2201, R. L. Haw. 1925, provides:

"Sec. 2201. *May make recommendations and bring suits.* If the commission shall be of the opinion that any public utility is violating or neglecting to comply with any territorial or federal law, or any provision of its franchise, charter, or articles of association, if any, or that changes, addi-

tions, extensions or repairs are desirable in its plant or service in order to meet the reasonable convenience or necessity of the public, or to insure greater safety or security, or that any rates, fares, classifications, charges or rules are unreasonable or unreasonably discriminatory, or that in any way it is doing what it ought not to do, or not doing what it ought to do, it shall in writing inform the public utility of its conclusions and recommendations, shall include the same in its annual report, and may also publish the same in such manner as it may deem wise. *The commission shall have power to examine into any of the matters referred to in section 2193, notwithstanding that the same may be within the jurisdiction of the interstate commerce commission, or within the jurisdiction of any court or other body, and when after such examination the commission shall be of the opinion that the circumstances warrant, it shall be its duty to effect the necessary relief or remedy by the institution and prosecution of appropriate proceedings or otherwise before the interstate commerce commission, or such court or other body, in its own name or in the name of the Territory,* or in the name or names of any complainant or complainants, as it may deem best."

Section 14, Act 89, S. L. Haw. 1913; Section 2202, R. L. Haw. 1925, provides:

"Sec. 2202. *Regulate rates, etc.; appeals.* All rates, fares, charges, classifications, rules and practices made, charged, or observed by any public utility, or by two or more public utilities, jointly, shall be just and reasonable, and the commission shall have power, after a hearing upon its own motion, or upon complaint, and in so far as it is not prevented by the Constitution or laws of the United States, by order to regulate, fix and change all such rates, fares, charges, classifications, rules and practices, so that the same shall be just and

reasonable, and to prohibit rebates and unreasonable discriminations between localities, or between users or consumers under substantially similar conditions. From every order made by the commission under the provisions of this section an appeal shall lie to the supreme court of Hawaii in like manner as an appeal lies from an order or decision of a circuit judge at chambers. Such appeal shall not of itself stay the operation of the order appealed from, but the supreme court may stay the same, after a hearing, upon a motion therefor, upon such conditions as it may deem proper as to giving a bond and keeping the necessary accounts or otherwise in order to secure a restitution of the excess charges, if any, made during the pendency of the appeal in case the order appealed from should be sustained in whole or in part."

Sec. 2203 empowers the Commission *to investigate rates* made by persons holding water leases from the Territory of Hawaii.

Sec. 2204 provides the procedure by the Commission to secure to consumers reasonable rates for water and to cancel water leases and licenses charging unreasonable rates.

Section 15, Act 89, S. L. Haw. 1913; Section 2205, R. L. Haw. 1925, provides a penalty of one thousand dollars for every violation of any order of the Commission or of any provision of this chapter.

Section 16, Act 89, S. L. Haw. 1913; Section 2206, R. L. Haw. 1925, provides that any person testifying falsely before the Commission shall be guilty of perjury.

Section 17, Act 89, S. L. Haw. 1913 as amended by Act 127, S. L. Haw. 1913; Section 2207, R. L. Haw. 1925, provides:

"Sec. 2207. *Finances.* All salaries, wages and expenses, including traveling expenses, of the com-

mission, each commissioner and its officers, assistants and employees, incurred in the performance or exercise of the powers or duties conferred or required by this chapter, may be paid out of any appropriation available for the purpose. Section 2542 shall apply to the commission and each commissioner, as well as to the supreme and circuit courts and the justices and judges thereof, and all costs and fees paid or collected hereunder shall be deposited in the treasury of the Territory to the credit of a special fund to be called the 'Public Utilities Commission fund' which is created for the purpose. There shall also be paid to the commission in each of the months of March and September in each year *by each public utility which is subject to investigation by the commission* a fee which shall be equal to one-twentieth of one per cent. of the gross income from the public utility business carried on by such public utility in the Territory during the preceding year, plus one-fiftieth of one per cent. of the par value of the stock issued by such public utility and outstanding on December 31 of the preceding year, if its principal business is that of performing public utility services in the Territory. Such fee shall likewise be deposited in the treasury to the credit of the fund. The moneys in the fund are appropriated for the payment of all salaries, wages and expenses authorized or prescribed by this chapter."

Section 18, Act 89, S. L. Haw. 1913; Section 2208, R. L. Haw. 1925, provides:

"Sec. 2208. *Definitions.* The term 'public utility' as used in this chapter shall mean and include every person, company or corporation, who or which may own, control, operate, or manage as owner, lessee, trustee, receiver, or otherwise, whether under a franchise, charter, license, articles of association, or otherwise, any plant or equipment, or any part thereof, directly or indi-

rectly for public use, for the transportation of passengers or freight, or the conveyance or transmission of telephone or telegraph messages, or the furnishing of facilities for the transmission of intelligence by electricity by land *or water* or air *between points within the Territory,* or for the production, conveyance, transmission, delivery or furnishing of light, power, heat, cold, water, gas or oil, or for the storage or warehousing of goods."

Section 19, Act 89, S. L. Haw. 1913; Section 2209, R. L. Haw. 1925, provides:

"Sec. 2209. *Validity of this chapter.* If any section, sub-section, sentence, clause or phrase of this chapter shall for any reason be held to be invalid as to any or all matters within its terms, such decision shall not affect the validity of the remaining portions of this chapter, or the validity of such portion as to any other matter within its terms."

Section 20, Act 89, S. L. Haw. 1913; Section 2210, R. L. Haw. 1925, provides:

"Sec. 2210. *Application of this chapter.* This chapter shall not apply to commerce with foreign nations, or commerce with the several states of the United States, except in so far as the same may be permitted under the Constitution and laws of the United States; nor shall it apply to public utilities owned or operated by the Territory, or any county or city and county, or other political division thereof."

APPENDIX B.

Act 135, Session Laws of 1913, provides:

"AN ACT

"Relating to Certain Gas, Electric Light and Power, Telephone, Railroad and Street Railway Companies and Franchises in the Territory of Hawaii and Amending the Laws Relating thereto.

"Be it Enacted by the Legislature of the Territory of Hawaii:

"Section 1. The franchises granted by Act 30 of the Laws of 1903 of the Territory of Hawaii, as amended and approved by an Act of Congress approved April 21, 1904, Act 48 of the Laws of 1903 of said Territory, as amended and approved by an Act of Congress approved April 21, 1904, Act 66 of the Laws of 1905 of said Territory, as amended and approved by an Act of Congress approved June 20, 1906, Act 105 of the Laws of 1907 of said Territory, as amended and approved by an Act of Congress approved February 6, 1909, Act 130 of the Laws of 1907 of said Territory, as amended and approved by said Act of Congress, approved February 6, 1909, Act 115 of the Laws of 1909 of said Territory, as amended and approved by an Act of Congress approved June 25, 1910, and Act 66 of the Laws of 1911 of said Territory, as amended and approved by an Act of Congress approved August 1, 1912, and the persons and corporations holding said franchises, shall be subject as to reasonableness of rates, prices and charges and in all other respects to the provisions of Act 89 of the Laws of 1913 of said Territory creating a public utility commission and all amendments thereof for the regulation of public utilities in said

Territory, and all the powers and duties expressly conferred upon or required of the Superintendent of Public Works or the courts by said acts granting said franchises are hereby conferred upon and required of said public utility commission and any commission of similar character that may hereafter be created by the laws of said Territory, and said acts granting said franchises are hereby amended to conform herewith.

"Section 2. This Act shall take effect upon its approval by the Congress of the United States.

"Approved this 29th day of April, A. D. 1913.

"WALTER F. FREAR,
"Governor of the Territory of Hawaii."

APPENDIX C

Act of Congress of March 28, 1916 (39 Stat. at L. 38, c. 53), provides:

"An Act to ratify, approve, and corfirm an act duly enacted by the Legislature of the Territory of Hawaii relating to certain gas, electric light and power, telephone, railroad, and street railway companies and franchises in the Territory of Hawaii, and amending the laws relating thereto.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act of the Legislature of the Territory of Hawaii, entitled 'An act relating to certain gas, electric light and power, telephone, railroad, and street railway companies and franchises in the Territory of Hawaii, and amending the laws relating thereto,' approved by the governor of the Territory April twenty-ninth, nineteen hundred and thirteen, be, and is hereby, *amended,* ratified, approved, and confirmed, as follows:

'ACT 135

'An Act relating to certain gas, electric light and power, telephone, railroad, and street railway companies and franchises in the Territory of Hawaii, and amending the laws relating thereto.

'Be it enacted by the Legislature of the Territory of Hawaii:

'SEC. 1. The franchises granted by Act thirty of the laws of nineteen hundred and three of the Territory of Hawaii, as amended and approved by an Act of Congress approved April twenty-first, nineteen hundred and four; act forty-eight of the laws of nineteen hundred and three of said Territory, as amended and approved by an Act of Congress approved April twenty-

first, nineteen hundred and four; act sixty-six of the laws of nineteen hundred and five of said Territory, as amended and approved by an Act of Congress approved June twentieth, nineteen hundred and six; act one hundred and five of the laws of nineteen hundred and seven of said Territory, as amended and approved by an Act of Congress approved February sixth, nineteen hundred and nine; act one hundred and thirty of the laws of nineteen hundred and seven of said Territory, as amended and approved by said Act of Congress approved February sixth, nineteen hundred and nine; act one hundred and fifteen of the laws of nineteen hundred and nine of said Territory, as amended and approved by an Act of Congress approved June twenty-fifth, nineteen hundred and ten; act sixty-six of the laws of nineteen hundred and eleven of said Territory, as amended and approved by an Act of Congress approved August first, nineteen hundred and twelve; *and all franchises heretofore granted to any other public utility or public-utility company, and all public utilities and public-utilities companies organized or operating within the Territory of Hawaii,* and the persons and corporations holding said franchises shall be subject as to reasonableness of rates, prices, and charges and in all other respects to the provisions of act eighty-nine of the laws of nineteen hundred and thirteen of said Territory creating a public-utilities commission and all amendments thereof for the regulation of public utilities in said Territory; and all the powers and duties expressly conferred upon or required of the superintendent of public works by said acts granting said franchises are hereby conferred upon and required of said public-utilities commission and any commission of similar character that may hereafter be created by the laws of said Territory; and said acts granting

said franchises are hereby amended to conform herewith; *Provided, however, That nothing herein contained shall in any wise limit the jurisdiction or powers of the Interstate Commerce Commission under the Acts of Congress to regulate commerce: And provided further, That all acts of the public-utility commission herein provided for shall be subject to review by the courts of the said Territory.*

'Sec. 2. This Act shall take effect upon its approval by the Congress of the United States.

'Approved the twenty-ninth day of April, anno Domini nineteen hundred and thirteen.

'WALTER F. FREAR,
'Governor of the Territory of Hawaii.

'Approved, March 28, 1916.' "

NOTE: The italicized portions indicate additions to Act 135, S. L. Haw. 1913, made by Amendment of Congress.

APPENDIX D

For the convenience of the Court, there is reprinted hereunder copies of the statutes referred to by the Supreme Court of the Territory of Hawaii in its opinion on Reserved Questions, (R. 25) showing that similar powers of investigation have been granted to administrative bodies by the various states.

ALABAMA—(Ala. Code, 1928):

"Sec. 9669. (5720). *Alabama commission may assist and apply to interstate commerce commission.* The commission shall investigate all complaints filed with them of the violation by the transportation companies doing business in this state of the rules, orders, and regulations of the interstate commerce commission, and when, in their opinion, the rates or charges of said transportation companies are excessive or discriminatory, or are levied in violation of the interstate commerce law, the commission shall present the facts to the transportation company with a request to make such changes as the commission may advise, and if such changes are not made within a reasonable time, the commission shall apply by petition to the interstate commerce commission for relief."

ARKANSAS—(*Crawford & Moses, Dig. of Stats. of Ark. 1921*):

"Sec. 1630. *Freight rates.* The state Commission shall have power and it is hereby made its duty to investigate all through freight rates and regulations on railroads in Arkansas; and when the same are, in the opinion of the Commission, excessive or levied in violation of the interstate commerce law, or the rules and regulations of the Interstate Commerce Commission, the officials of the railroad are to be notified of the facts and requested to reduce them or make the proper correc-

tion as the case may be. When the rates are not changed or the proper corrections are not made, according to the request of the Commission, the latter is instructed to notify the Interstate Commerce Commission and to apply to it for relief."

ARIZONA—(*Struckmeyer, Revised Code Ariz. 1928*):

"Sec. 691. *Interstate rates.* The commission may investigate all existing or proposed interstate rates, fares, tolls, charges and classifications, and all rules and practices in relation thereto, for or in relation to the transportation of persons or property or the transmission of messages or conversations, where any act in relation thereto shall take place within this state; and when the same are excessive or discriminatory or in violation of the acts of congress or in conflict with the orders or requirements of the interstate commerce commission, the commission may apply to the interstate commerce commission or to any court of competent jurisdiction for relief."

CALIFORNIA—(*Hyatt, part two, Henning's General Laws of Calif. 1920*):

"*Power to investigate interstate rates.*

"Sec. 34. The commission shall have the power to investigate all existing or proposed interstate rates, fares, tolls, charges and classifications and all rules and practices in relation thereto, for or in relation to the transportation of persons or property or the transmission of messages or conversations, where any act in relation thereto shall take place within this state; and when the same are, in the opinion of the commission, excessive or discriminatory or in violation of the act of congress entitled 'An act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, and the acts amendatory thereof and sup-

plementary thereto, or of any other act of congress, or in conflict with the rulings, orders or regulations of the interstate commerce commission, the commission may apply by petition or otherwise to the interstate commerce commission or to any court of competent jurisdiction for relief.

GEORGIA—(II Park's Ann. Code, Ga. 1914):

"Sec. 2645. *Commissioners to investigate through rates.* It shall be the duty of the railroad commission to investigate thoroughly all through freight rates from points out of Georgia to points in Georgia, and from points in Georgia to points out of Georgia.

"Sec. 2646. *Report improper charges to railroad officials.* When the commission finds that a through rate, charged into or out of Georgia, is in their opinion excessive or unreasonable, or discriminatory in its nature, it shall call the attention of the railroad officials of Georgia to the facts, and urge upon them the propriety of changing such rate or rates.

"Sec. 2647. *If not changed, to report to interstate commission.* Whenever such rates are not changed according to the suggestion of the railroad commission, it shall be the duty of the commission to present the facts, whenever it can legally be done, to the interstate commerce commission, and to appeal to it for relief."

IOWA—(Code of Iowa, 1927):

"Sec. 7890. *Interstate freight rates.* The Board shall exercise constant diligence to ascertain the rates, charges, rules, and practices of common carriers operating in this state, in relation to the transportation of freight in interstate business. When it shall ascertain from any source or have reasonable grounds to believe that the rates

charged on such interstate business or the rules or practices in relation thereto discriminate unjustly against any of the citizens, industries, interests, or localities of the state, or place any of them at an unreasonable disadvantage as compared with those of other states, or whether in violation of the laws of the United States regulating commerce, or in conflict with the rulings, orders or regulations of the interstate commerce commission, the board shall take the necessary steps to prevent the continuance of such rates, rules, or practices.

"Sec. 7891. *Application. Interstate commerce commission.* When any common carrier has put in force any rates, rules or practices in relation to interstate freight business, in violation of the laws of the United States regulating commerce, or of the orders, rules or regulations of the interstate commerce commission, or shall unjustly discriminate against any of the citizens, industries, interests, or localities of the state, the board shall present the material facts involved in such violations or discrimination to the interstate commerce commission and seek relief therefrom, and if deemed necessary or expedient, the board shall prosecute any charge growing out of such violation or discrimination, at the expense of the state, before the interstate commerce commission."

KANSAS—(Revised Stat. of Kan. Ann., 1923):

"Sec. 66-148. *Through rates.* The public utilities commission shall have power, and it is hereby made its duty to investigate all freight rates on railroads in Kansas; and when the same are in the opinion of the commission excessive, or levied in violation of the interstate commerce law, or the rules and regulations of the interstate commerce commission, the officials of such railroad shall be notified of the facts and requested to reduce the

rates or make the proper corrections, as the case may be. When the rates are not changed or the proper corrections are not made, according to the request of the public utilities commission, the latter shall notify the interstate commerce commission, and apply to it for relief, by filing a complaint; and all the cases commenced before the interstate commerce commission under the authority conferred by this section shall be brought in the name of the public utilities commission of the state of Kansas, by the attorney for the commission, and all such cases shall be prosecuted at the expense of the state."

MARYLAND—(1 Ann. Code—Bagby, p. 835, Art. 23):

"Sec. 348. The commission may investigate freight rates on interstate traffic of common carriers within the state, and when such rates are, in the opinion of the commission, excessive or discriminatory, or are levied or laid in violation of the interstate commerce law, or in conflict with the ruling, orders or regulations of the interstate commerce commission, the commission may apply by petition to the interstate commerce commission for relief, or may present to the interstate commerce commission all facts coming to its knowledge, as to violations of the rulings, orders or regulations of that commission, or as to violations of the interstate commerce law."

MINNESOTA—(General Statutes, 1923):

"Sec. 4719. *Railroad and Warehouse Commission Authorized to Co-operate with Interstate Commerce Commission.* The Railroad and Warehouse Commission is hereby authorized to co-operate with the Interstate Commerce Commission for the purpose of harmonizing state and federal regulations of the common carriers within the State of Minnesota to the extent and in the man-

ner deemed advisable by the Railroad and Warehouse Commission.

"Sec. 4720. *Joint Hearings.* The Railroad and Warehouse Commission may conduct joint hearings with the Interstate Commerce Commission within or without the State of Minnesota.

Sec. 4721. *May participate in Proceedings.* The Railroad and Warehouse Commission is hereby authorized to appear and participate in any proceedings pending before the Interstate Commerce Commission when it considers such appearance and participation advisable and in the interest of the people of the State of Minnesota.

"Sec. 4660. *Interstate Commerce Commission. Authority of State Commission to Institute Proceedings.* Whenever a resident of this state shall file with the State railroad and warehouse commission of the United States, charging any railroad company or other common carrier doing business in this state, engaged in interstate transportation of freight, with any violation of the interstate commerce act of the United States, setting forth in such petition the facts constituting such violation, such railroad commission, if they deem the matter one of public interest, shall file said petition with the interstate commerce commission and thereupon shall appear in said matter in the place of said petitioner and thereafter prosecute the same at the expense of the state."

MISSOURI—(Rev. Statutes of Missouri, (1909) Vol. I, p. 1178):

"Sec. 3253. *Commissioners to Enforce Reasonable Rates.* It is hereby made the duty of the railroad commissioners to exercise constant diligence in informing themselves of the rates and charges of the common carriers engaged in the transportation of freight from points of this state to points

beyond its limits, and from points in other states to points in this state; and whenever it shall come to the knowledge of the railroad commissioners, by complaint made to them or in any other manner, that the rates charged by any such common carrier on interstate business are unjust, excessive or unreasonable, or that such rates discriminate against the citizens of the state, the commissioners shall cause the facts thereof to be embodied in a complaint setting forth, in detail, the respect in which the rate complained of is unjust, excessive or unreasonable, and shall file said complaint with the interstate commerce commission and demand a hearing thereof, and shall thereafter furnish testimony in support thereof, and diligently present the facts upon which such complaint is based. At the time of filing said complaint, the railroad commission shall give notice thereof to the attorney-general, who shall prosecute the same to final determination before the said interstate commerce commission."

NEW YORK—(Cons. Laws of N. Y.—Cahill, (1930) Chapter 49, p. 1878):

"Sec. 59. *Duties of the Commission as to Interstate Traffic.* Either commission may investigate interstate freight or passenger rates or interstate freight or passenger service on railroads within the state, and when such rates are, in the opinion of either commission, excessive or discriminatory or are levied or laid in violation of the act of congress entitled 'An act to regulate commerce,' approved February fourth, eighteen hundred and eighty seven, and the acts amendatory thereof and supplementary thereto, or in conflict with the rulings, orders or regulations of the interstate commerce commission, and the commission may apply by petition to the interstate commerce commission for relief or may present to the interstate commerce commission all facts coming to its

knowledge, as to violations of the rulings, orders, or regulations of that commission or as to the violations of said act to regulate commerce or acts amendatory thereof or supplementary thereto."

NORTH CAROLINA—(Cons. Stat. Ann. (1919) p. 464):

"Sec. 1075. *Interstate Commerce.* Upon the complaint of any person or a community to the commission of any unjust discrimination or unjust or unreasonable rate in carrying freight which comes from or goes beyond the boundaries of the state by any railroad whether organized under the laws of this state or of another state doing business in this state, the commission shall investigate such complaint, and if the same be sustained it shall be the duty of the commission to bring such complaint before the interstate commerce commission for redress in accordance with the provisions of the act of Congress establishing the interstate commerce commission. They shall receive upon application the services of the attorney general of the state, and he shall represent them before the interstate commerce commission."

NEW HAMPSHIRE—(Public Laws, 1926 Vol. II, p. 923):

"*Investigation of interstate commerce.*

"22. *Investigations.* The commission may, upon complaint, investigate all existing or proposed interstate rates, fares, charges, classifications and rules and regulations relating thereto, where any act thereunder may take place within this state.

"23. *Petitions, etc.* When the same are found to be, in the opinion of the commission unjust, unreasonable, unjustly discriminatory or otherwise in any respect in violation of the provisions of the act to regulate commerce, or of any other act of congress, or in conflict with the rules and orders

of the interstate commerce commission, or of any other department of the federal government, the commission may apply for relief by petition or otherwise to the interstate commerce commission or to any other department of the federal government, or to any court of competent jurisdiction."

OREGON—(2, Olsen, Genl. Laws of 1920, p. 2374):

"Sec. 5872. *Investigation of Interstate Rates. Proceedings before Interstate Commerce Commission.* The public service commission shall have power, and it is hereby made its duty, to investigate all interstate rates, fares, charges, classifications, or rules of practice in relation thereto, for or in relation to the transportation of persons or property or the transmission of messages or conversations, where any act in relation thereto shall take place within this state, and when the same are, in the opinion of the commission, excessive or discriminatory or are levied or laid in violation of the interstate commerce law, or in conflict with the rulings, orders or regulations of the interstate commerce commission, the commission shall present the facts to the railroad or other affected or interested utility, with the request to make such changes as the commission may advise, and if such changes are not made within a reasonable time the commission shall apply by petition to the interstate commerce commission all facts coming within its knowledge as to violations of the rulings, orders or regulations of that commission, or as to violations of the said act to regulate commerce or acts amendatory thereof or supplementary thereto. All tariffs issued by any railroad or utility relating to interstate traffic in this state shall be filed in the office of the commission within thirty days after the passage of this act, and all such tariffs thereafter issued shall be filed with the commission when issued."

PENNSYLVANIA—(West, (1920) p. 1750):

"Sec. 18135. *Powers as to Interstate Traffic.* The Commission may investigate the rates of interstate traffic facilities or service of common carriers within this Commonwealth, and when such rates, facilities, or service are, in the determination of the commission, unjust, unreasonable, or unjustly discriminatory, or unduly or unreasonably preferential, or in violation of the interstate commerce law, or in conflict with the rulings, orders, or regulations of the Interstate Commerce Commission, the commission may apply by petition to the said Interstate Commerce Commission for relief, or may present to the said Interstate Commerce Commission all facts coming to its knowledge as to the violation of the rules, orders, or regulations of that commission, or as to the violations of the interstate commerce law."

SOUTH DAKOTA—(Compiled Laws, 1929, Vol. II, p. 3264):

"Sec. 9577. *Petition Interstate Commerce Commission.* Whenever a resident of this state shall file with the board of railroad commissioners a petition, directed to the interstate commerce commission of the United States, charging any railroad or other common carrier doing business in this state, engaged in interstate transportation of freight, with any violation of the interstate commerce act of the United States, setting forth any such petition of facts constituting such violation, such board, if it deems the matter one of public interest, shall file such petition with such interstate commerce commission and thereupon shall appear in such matter in the place of such petitioner and thereafter prosecute the same at the expense of the state.

"Sec. 9578. *Appear before Interstate Commerce Commission.* Whenever any matter shall be pend-

ing before the interstate commerce commission of the United States, between a resident of this state as petitioner and any railroad or other common carrier doing business in this state and engaged in interstate transportation of freights, charging such carrier with any violation of such interstate commerce act, upon application of the petitioner the board of railroad commissioners, in case it deems the questions involved of public interest, may appear therein and be substituted as a party in place of such petitioner and thereafter such matter shall be prosecuted by such board at the expense of the state in the same manner as though originally begun by it."

WISCONSIN—1 Wis. Stat. Sec. 1797-21, p. 1536. Sec. 21 of the Railway Commission Act is a copy of the Oregon law cited above.

SUPREME COURT OF THE UNITED STATES.

No. 94.—October Term, 1938.

Inter-Island Steam Navigation Company, Limited, Petitioner,
vs.
Territory of Hawaii by Public Utilities Commission of the Territory of Hawaii, Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[December 5, 1938.]

Mr. Justice Black delivered the opinion of the Court.

Petitioner, a Hawaiian corporation, is a common carrier of freight and passengers by water between different points in the Territory. A substantial part of its gross income is derived from transporting freight destined for trans-shipment to foreign or mainland ports. In 1913 a statute of the Territory created a Public Utilities Commission, prescribed its duties and levied a uniform semi-annual tax—denominated a fee[1]—upon all public utilities doing business in the Territory, partially to defray the Commission's expenses. Petitioner paid the tax until 1923, when it refused to make further payments, contending the tax could not validly be applied to it. In this suit, the Territory recovered judgment in the territorial court for the taxes assessed for the years 1923 to 1930, inclusive. The Supreme Court of Hawaii and the Circuit Court of Appeals both affirmed.[2]

The Hawaiian "Utilities Act of 1913,"[3] under which the challenged taxes have been levied, invested the territorial Commission with broad powers to investigate all public utilities doing business in the Territory, with reference to the safety and accommodation of the public; safety, working hours and wages of employees; rates and fares; valuation; issuance of securities; amount and dispo-

[1] Cf., New York *v.* Latrobe, 279 U. S. 421, 427.

[2] 33 Haw. 890. 96 Fed. (2d) 412. Certiorari granted, — U. S. —.

[3] Act 89 S. L. Haw. 1913, as amended by Act 127, S. L. Haw. 1913, c. 132, of the Revised Laws Hawaii, 1925, c. 261, Revised Laws Hawaii, 1935.

sition of income; business relations with others; compliance with territorial and Federal laws and provisions of franchises, charters and articles of association; regulations, practices and service; accidents, in connection with utility operations, believed by the Commission to require investigation and "all matters of every nature affecting the relations and transactions between . . . [such utilities] and the public, or persons, or corporations."

This territorial Commission was empowered to make its investigations "notwithstanding that the same may be within the jurisdiction of the Interstate Commerce Commission, or within the jurisdiction of any Court or other body, and when after such examination the [territorial] commission shall be of the opinion that the circumstances warrant, it shall be its duty to effect the necessary relief or remedy by the institution and prosecution of appropriate proceedings or otherwise before the Interstate Commerce Commission, or such Court, or other body, in its own name or the name of the Territory, ..."

The taxes in question accrued under Section 17 of the Act of 1913, providing that "There shall . . . be paid to the commission in each of the months of March and September in each year by each public utility which is subject to investigation by the commission a fee which will be equal to one-twentieth of one per cent of the gross income from the public utility business carried on by such public utility in the Territory during the preceding year, plus one-fiftieth of one per cent of the par value of the stock issued by such public utility and outstanding on December 31 of the preceding year, ..." After collection, the taxes "shall be deposited in the treasury of the Territory to the credit of a special fund to be called the 'Public Utilities Commission Fund'" to be used—with any appropriations made available by the territorial legislature—to pay necessary expenses of the Commission in the performance of its duties under the Act.

The Organic Act granting legislative power to the territorial government of Hawaii provides that "the legislature shall not grant to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise without the approval of Congress; . . . ."[4] Pursuant to the Organic Act, and prior to

[4] Act of Cong., April 30, 1900, c. 339, § 55 (31 Stat. 150; U. S. C., Title 48, § 562).

the effective date of the Utilities Act of 1913, the territorial legislature passed Act 135 S. L. Haw. 1913—to take effect upon the approval by Congress—providing that all public utilities previously granted franchises should "be subject as to reasonableness of rates, prices and charges and in all other respects to the provisions of . . . [the Utilities Act of 1913] and all amendments thereof for the regulation of public utilities in said Territory . . . . ." March 28, 1916,[5] Congress expressly ratified, approved and confirmed this Hawaiian Act 135.

Act 135 as enacted by the Territory applied only to Hawaiian utilities specially described in the Act. However, Congress in ratifying and approving, broadened the Act by amendment so as to include not only the described utilities but "all public utilities and public-utilities companies organized or operating within the Territory of Hawaii." By further amendment Congress provided that nothing in Act 135 should "limit the juri iction or powers of the Interstate Commerce Commission" and that all actions of the Hawaiian Public Utility Commission should "be subject to review by the courts of the . . . Territory."

September 7, 1916, Congress enacted the "Shipping Act of 1916."[6] For the purposes of the Shipping Act, "The term 'common carrier by water in interstate commerce'" was given a statutory definition to include "a common carrier . . . by water of passengers or property . . . on regular routes from port to port between . . ." places in the same "Territory, District or possession." This Act created the United States Shipping Board, with broad powers to investigate and supervise carriers by water in foreign and interstate commerce as defined therein.

We accept the conclusion of the Supreme Court of Hawaii that petitioner is a public utility as defined by the Hawaiian Act.[7] However, petitioner contends that the Territory cannot validly apply this tax to it. We have examined all of the grounds upon which this contention rests. None is sufficient to remove petitioner from the operation of the Utilities Act of 1913 as applied here.

First. Petitioner contends that the passage of the Shipping Act by Congress completely ousted the territorial Commission of all jurisdiction over it in any respect, or for any purpose, and thus withdrew the Commission's power to collect the fees in question.

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[5] 39 Stat. at L. 38, c. 53.

[6] 39 Stat. 728, c. 451, Act of September 7, 1916.

[7] Cf., Waialua Agricultural Co. v. Christian et al., — U. S. —.

The Supreme Court of Hawaii held in this case, as heretofore,[8] that the Shipping Act did deprive the territorial Commission of authority, under the Act of 1913, to regulate by its own order the rates of this petitioner. In the present case, however, that court concluded that the Shipping Act did not withdraw the territorial Commission's power to *investigate* water carriers—such as petitioner—as to rates and other matters, either for the exercise of its own permitted supervisory powers or for presentation of the public's case before appropriate governmental bodies.[9] The territorial Act of 1913—to which Congress in 1916 subjected all utilities doing business in Hawaii—gave the territorial Commission jurisdiction over many matters other than rate regulation. In general, the Commission was empowered to supervise and regulate local properties and activities of utilities and to protect the public interest in relation to rates, operations, and many other phases of the utility business. While, in some instances, the Commission was powerless to enter any final order, nevertheless its authority to investigate and to appear before appropriate governmental agencies was designed as a part of a general plan to safeguard the public interest. The Shipping Act invested the Shipping Board with authority over some of these matters. But no language in that Act indicates that Congress intended to withdraw all of the territorial Commission's jurisdiction over territorial water carriers. While Congress had complete power to repeal the entire territorial Public Utilities Act, "an intention to supersede the local law [of a Territory] is not to be presumed, unless clearly expressed."[10] Peti

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[8] Re Inter Island S. N. Co., 24 Haw. 136.

[9] Similarly, many states have authorized utility commissions to make investigations and to institute proceedings before the Interstate Commerce Commission. Ala. Code (Michie), 1928, Sec. 9669; Crawford & Moses Dig. of Stats. of Ark. 1921, Sec. 1630; Struckmeyer, Revised Code Ariz. 1928, Sec. 691; Gen. Laws of Calif., 1937 (Deering), § 34; Code of Ga., 1933, § 93-314; Code of Iowa, 1931, §§ 7890, 7891; Revised Stat. of Kan. Ann., 1923, Sec. 66-148; Md., 1 Ann. Code—Bagby, p. 835, Art. 23, Sec. 384; 1 Mason's Minn. Stat. (1927), § 4660; Rev. Statutes of Missouri (1929), Sec. 5187; Consol. Laws of N. Y.—Cahill (1930), Chapter 49, p. 1878; Sec. 59; (North Carolina) Cons. Stat. Ann. (1919), p. 464, Sec. 1075; New Hampshire Public Laws 1926, Vol. II, p. 923, (22, 23); 2 Olson, Ore. Laws of 1920, p. 2374, Sec. 5872; 66 Purdon's Penna. Stat., § 552; (South Dakota)—Compiled Laws 1929, Vol. II, p. 3264, Sec. 9577-8; (1935) Wis. Stat., Sec. 195.17.

"In its general scope and purpose, as well as in its terms, [the Shipping Act] . . . closely parallels the Interstate Commerce Act; and we cannot escape the conclusion that Congress intended that the two acts, each in its own field, should have like interpretation, application and effect." U. S. Nav. Co. v. Cunard S. S. Co., 284 U. S. 474, 481.

[10] France v. Connor, 161 U. S. 65, 72; see Davis v. Beason, 133 U. S. 333; Cope v. Cope, 137 U. S. 682; cf., Savage v. Jones, 225 U. S. 501, 533; Gilvary v. Cuyahoga Valley Ry., 292 U. S. 57, 60.

tioner owns, controls, operates and manages numerous steam vessels, wharfs, docks and real and personal property useful in the transportation of passengers and freight between the various ports and islands of Hawaii. Petitioner's gross income between the years 1922 and 1929 from business transacted in the Territory amounted to approximately $18,000,000. This Territory is located far from the mainland of the United States. Only clear and explicit statutory language could justify a holding that Congress intended by the Shipping Act to deprive the territorial government of *all* jurisdiction over activities such as petitioner's, vitally affecting the trade, commerce, safety and welfare of the people of the Territory.

We agree with the Supreme Court of Hawaii that the Shipping Act of 1916 did not wholly supersede the territorial Act of 1913 as applied to water carriers like petitioner, and did not take from the territorial Commission its power to investigate such utilities. A valid legislative power necessarily includes the right to provide funds to be expended in its exercise.

Second. Petitioners contend, however, that the taxes involved constitute a burden on interstate and foreign commerce in violation of the Commerce Clause of the Federal Constitution. But here, Congress, by its Act of 1916, subjected petitioner to the territorial law under which these very taxes were levied.

Under the Constitution, Congress has the power to regulate interstate commerce.[11] Therefore, assuming—but not deciding—that petitioner is engaged in interstate and foreign commerce, Congress has exercised its power in the present case by permitting the Territory to act upon this commerce by the imposition of the contested taxes. The imposition of these taxes under an Act to which Congress expressly subjected petitioner does not violate the Commerce Clause.

Congress had the power to subject petitioner to this tax by virtue of its authority over the Territory, in addition to its power under the Commerce Clause. "Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void. In other words, it has full

[11] For illustrations of the extent of this power, see Gibbons *v.* Ogden, 9 Wheaton 1, 196; In re Rahrer, 140 U. S. 545; Second Employers' Liability Cases, 223 U. S. 1; Houston & Texas Ry. *v.* United States (Shreveport Case), 234 U. S. 342; Clark Distilling Co. *v.* West'n Md. Ry. Co., 242 U. S. 311; Alabama Ry. *v.* Jackson Ry., 271 U. S. 244, 250.

and complete legislative authority over the people of the Territories and all th departments of the territorial governments."[12]

Third. Petitioner contends that the challenged tax is prohibited by the Fifth Amendment because "no investigation, supervision, or regulation of petitioner was in fact made by the Commission."

A general tax designed to effectuate a plan for control and supervision of public utilities need not be apportioned among the taxpayers according to the actual services performed directly for each. Such a requirement would seriously impair the effective application and operation of general tax systems. Services performed by the Hawaiian Public Utilities Commission were for the benefit of the public as a whole and are not any the less services beneficial to petitioner because its business has not been given any special assistance.[13] "A tax is not an assessment of benefits."[14]

The judgment is

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[12] Mormon Church v. United States, 136 U. S. 1, 43; cf., Seve v. Pitot, 6 Cranch 332, The American Ins. Co. et al v. Canter, 1 Pet. 511, Door v. United States, 195 U. S. 138, Cincinnati Soap Co. v. United States, 301 U. S. 308.

[13] Cf. Clyde Mallory Lines v. Alabama, 296 U. S. 261, 266.

[14] Carmichael v. Southern Coal Co., 301 U. S. 495, 522.